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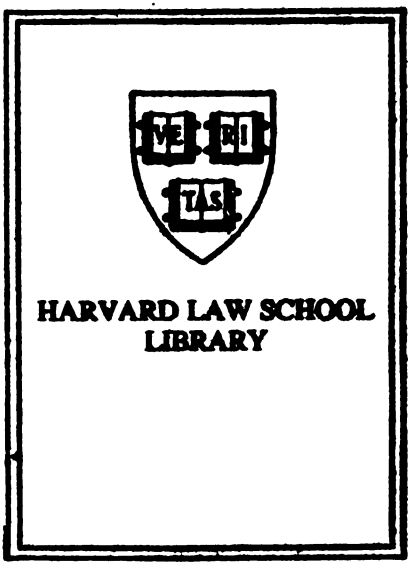

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MINNESOTA REPORTS

VOL. 120

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

DECEMBER 13, 1912—FEBRUARY 21, 1913

HENRY BURLEIGH WENZELL
REPORTER

LAWYERS' CO-OPERATIVE PUBLISHING CO.
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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF SAID STATE

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JUSTICES

OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

Hon. CHARLES M. START, Chief Justice[1]
Hon. CALVIN L. BROWN, Chief Justice[2]
Hon. GEORGE L. BUNN[1] [3]
Hon. PHILIP E. BROWN
Hon. ANDREW HOLT
Hon. OSCAR HALLAM[4]

IRVING A. CASWELL, Esq., Clerk

ATTORNEY GENERAL

Hon. LYNDON A. SMITH

---

[1] Term expired January 6, 1913.

[2] Term commenced January 6, 1913. Associate Justice until that date.

[3] Appointed Associate Justice to succeed Associate Justice Brown, elected Chief Justice.

[4] Term commenced January 6, 1913.

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NOTE

By R. L. 1905, § 85, the reporter is required to report all cases decided by the court.

Pursuant to R. L. 1905, § 74, the headnote in each case is prepared by the judge writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases in this volume are from the October, 1912, term calendar.

As required by R. L. 1905, § 85, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

The footnotes in the present volume which are preceded by the word "[Note]" are inserted by the publisher pursuant to the terms of paragraph 4 of its contract dated May 8, 1909, with the Secretary of State.

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RULES OF PRACTICE

OF THE

SUPREME COURT

In force from and after July 1, 1913

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RULE I

Clerk—duties of—notice of argument or note of issue not necessary—calendar. 1. The clerk shall keep a general docket or register, in which he shall enter the title of all actions and proceedings, including the names of the parties and the attorneys or solicitors by whom they prosecute or defend, and he shall enter thereunder, from time to time, of the proper dates, brief notes of all papers filed and all proceedings had therein; the issuing of writs and other process and the return thereof; the court or officer to whom directed; the return of any court, officer or other person thereto; the filing of any bond or other security, and the issuing of a certificate of supersedeas, and of all orders and judgments in any action or proceeding, whether of course or on motion; also proper references to the number and term of all papers and proceedings.

2. He shall also keep a judgment book, in which he shall enter all judgments; the names of the parties thereto, plaintiff and defendant; the date of the judgment, its number and term, the amount thereof, if the recovery of money or damages is included therein, and the amount of costs, which record shall be properly indexed.

3. He shall keep a court journal, in which he shall enter, from day to day, brief minutes of all proceedings in court.

4. He shall file all papers presented to him; indorse thereon the style of the action, its number and term, the character of the paper and date of filing; and, after filing, no paper shall be taken from the office unless by order of the court or a judge thereof.

5. No notice of argument or note of issue shall be necessary to entitle a cause to be heard, and the clerk will enter upon the calendar

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for each term of court all pending causes in which the notice of appeal or writ of error was served more than thirty days prior to the first day of the term for which the calendar is prepared;—furnishing a copy of the calendar to members of the court and bar. Causes shall be so placed on the calendar in the order and according to the date of service of the notice of appeal or writ of error.

6. Appeals or writs of error served within thirty days of the term, but more than eight days before the first day thereof, the return being on file, may be placed on the calendar by stipulation of the parties; and such appeals, or those taken during term time, may be placed on the calendar by order of the court where an early decision is necessary to the protection of the rights of either party.

RULE II

Entering cause on calendar during term—duty of clerk. When the clerk shall be directed to enter a cause upon the calendar during term, he shall transcribe the same into the copies of the calendar furnished to the judges, for which service he shall be entitled to a fee of one dollar, to be paid by the party upon whose motion such entry is ordered.

RULE III

Motions—bringing on for hearing—motion papers. Motions, except for orders of course, shall be brought on upon notice, and when not made upon the records or files of the court, shall be accompanied with the papers on which the same are founded.

RULE IV

Return—notice to file—dismissal. The appellant or plaintiff in error shall cause a complete return to be made and filed with the clerk of this court, as provided for by chapter 55, Laws 1913, within ten days after the notice of appeal or writ of error is served. If he fails to do so the respondent or defendant in error may, by notice in

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writing, require such return to be filed within ten days after the service of such notice, and if the complete return is not filed in pursuance of such notice, the appellant or plaintiff in error shall be deemed to have abandoned the appeal or writ of error, and, on an affidavit proving when the notice of appeal or writ of error was served, and the service of such notice, and a certificate of the clerk of this court that no such return has been filed, a justice of this court may enter an order with the clerk dismissing the appeal or writ of error for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal or writ of error.

(This rule is intended to speed the prosecution of appeals, and it enables the respondent, if he so elects, to secure a dismissal of the appeal, either in vacation or term time. If notice to make the return is not given, it in no manner affects the rights of the respondent to move the court for a dismissal of the appeal or to affirm for a noncompliance with its rules. Guerin v. Railroad Co. 32 Minn. 409; Plymouth Clothing Co. v. Seymour, 74 Minn. 425; West Publishing Co. v. De La Motte, 104 Minn. 174.)

RULE V

Defective return—procuring additional papers. If the return made by the clerk of the court below is defective, and all papers, exhibits, orders or records necessary to an understanding or decision of the case are not transmitted, either party may, on an affidavit specifying the defect or omission, apply to a justice of this court for an order requiring the district clerk to make further return and supply the defect or omission without delay.

RULE VI

Indorsement of return by clerk of district court. The clerk of the district court shall indorse upon each return to this court the names and postoffice addresses of the attorneys for the respective parties.

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RULE VII

Original papers—procuring order for transmission to appellate court. Whenever it is deemed necessary to the decision of any cause that any original paper or papers be inspected by this court, which paper or papers were used on the trial below, but for any reason, whether because copies were substituted for the originals or otherwise, they are not on file, a justice of this court may, ex parte, make such order for the transmission, safe keeping and return of such paper or papers as he deems proper.

All exhibits sent to the clerk of this court shall have endorsed thereon the title of the case to which they belong.

All original exhibits, maps and diagrams sent to the clerk of this court by the clerk of the court below, will in all cases be returned with the remittitur, all models will be so returned when necessary on a new trial, but where the decision of the court is final and no new trial is to be had, such models will be destroyed by the clerk of this court, unless called for by the parties within three months after final decision is rendered.

RULE VIII

Writ of error—giving notice of. On the issuance from this court of a writ of error, the plaintiff in error in such writ shall give notice in writing to the attorney general and the county attorney of the county in which the action is triable, within ten days after the issuing of such writ, that such writ has been sued out.

RULE IX

Record and briefs—furnishing copies to court and reporter. 1. The appellant, or party removing a cause to this court, shall, at least three days (excluding Sunday) previous to the argument thereof, file ten copies—one for each of the judges and commissioners, and one for the reporter, clerk and librarian, respectively—

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of the record, his assignment of errors and brief, and within the same time the respondent shall file ten copies of his brief.

2. The record and briefs must be printed and the folios of the record distinctly numbered in the margin. The record shall consist of the pleadings, the findings or verdict, the order or judgment appealed from, the reasons of the trial court for the decision, if any, the notice of appeal and, in cases where the sufficiency of the evidence is not involved, such abridgement of the settled case as will clearly and fully present the questions arising on the appeal. All matters in the return not necessary to a full presentation of the questions raised by the appeal shall be excluded from the printed record, and to that end the material testimony may be printed in narrative form, immaterial parts thereof omitted, and documentary evidence condensed. If the respondent deems the record so printed not sufficiently full to present properly the merits of the appeal, he may print a supplemental record, or, instead thereof, in his brief, refer to the folios or pages in the settled case, the original of which will be on file in this court, which he deems necessary and important.

3. Prefixed to the brief of the appellant, but stated separately, shall be an assignment of errors intended to be urged. Each specification of error shall be separately, distinctly and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below, or referee, is not sustained by the evidence, it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject-matter will be considered unless stated in the assignment of errors. All references to evidence shall distinctly point to the folio and page of the settled case where the same may be found.

4. The brief of appellant shall contain a concise statement of the case so far as necessary to present the questions involved, and shall state separately the several points relied on for a reversal of the order or judgment of the court below, with a list of authorities to be cited in support of the same.

5. Whenever the brief of the prevailing party or the record or supplemental record contains any unnecessary, irrelevant or im-

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material matter, he shall not be allowed any disbursements for preparing or printing such unnecessary matter.

The party entitled to object to the taxation of disbursements in such cases shall point out—specifying the folios——the particular portions of the record, supplemental record or brief for which he claims that the opponent is not entitled to tax disbursements.

Reference to evidence to point to folio — 123 Minn.

RULE X

Examination of evidence—stating points in facts claimed to be established—argument of question of fact. In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall add to the copies of his points furnished the court the leading facts which he deems established, with reference to the folio and page of settled case where he deems the proof of such facts may be found. And the court will not hear an extended discussion upon a mere question of fact.

RULE XI

Record—printing. Records, assignments of error and briefs shall be neatly and legibly printed in leaded small pica or long primer type with black ink on white writing paper, properly paged at the top. The record shall be properly folioed at the side. All records, assignments of error and briefs shall be printed with a margin on the outer edge of one and one-half inches. The printed page shall be seven inches long and three and one-half inches wide, and the paper page shall be nine inches long and seven inches wide. Each brief shall be signed by the counsel preparing it. Each copy of such brief or record shall be stitched together; and its proper designation, the title of the cause and the names and addresses of the attorneys for the respective parties, shall be printed on the outside thereof. Every record and every brief exceeding fifty pages shall

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be accompanied with an adequate index; describing exhibits by number or letter and name of document.

Records or briefs which fail to conform to this rule shall not be filed.

RULE XII

Record and brief—service—reply brief. 1. In all cases where the notice of appeal or writ of error was served more than sixty days before the first day of the term at which the cause is to be heard, the appellant or plaintiff in error shall, twenty-five days before the first day of such term, serve upon respondent or defendant in error, a copy of the printed record and his points and authorities, and the respondent or defendant in error shall serve his points and authorities on or before the first day of such term.

2. In all cases where the notice of appeal or writ of error was served less than sixty and more than thirty days before the first day of the term at which the cause is to be heard, the appellant or plaintiff in error shall serve his printed record and points and authorities at least thirty days before the day set for the argument of the cause, and respondent or defendant in error shall serve his points and authorities at least five days before the day of argument.

3. Appellant or plaintiff in error may reply in typewritten or printed form on or before the day preceding the argument. The reply shall be limited strictly to a concise answer to new points made by respondent or defendant in error.

RULE XIII

Default of appellant—affirmance or dismissal. Respondent or defendant in error may apply to the court for judgment of affirmance or dismissal, as the case may be, if the appellant or plaintiff in error shall fail or neglect to serve the record and his points and authorities as required by these rules. But no reversal will be ordered for the failure of the respondent or defendant in error to appear, unless the record presents reversible error.

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RULE XIV

Failure to furnish papers—continuance. In case of the failure of the appellant or plaintiff in error to furnish papers as required by these rules the action will be continued by the court upon its own motion, unless an affirmance or dismissal is ordered on application of the other party under Rule 13.

RULE XV

Call of calendar—setting causes for argument—motions. On the first day of the term the court will proceed to call the calendar in order to set causes for oral argument or for submission on briefs, and will continue the call until there shall be as many causes so set as the court shall believe can be disposed of during the term. On such day, motions in causes on the calendar, to strike from the calendar, or to dismiss, or affirm, may be orally noticed in open court and will be heard during the first week of the term.

On the call of the calendar, if neither party to a cause called shall have it set for oral argument or submission on briefs, or if neither party shall move a cause or submit it when it is called on the day on which it is set for oral argument, or if it be set for submission on briefs, if neither party shall have filed his brief by the day appointed for the briefs to be filed, or if no day be appointed, neither party shall file his brief during the term, the cause shall be continued to the next term.

RULE XVI

Calling calendar—motions—setting cases for hearing. On the first day of the term the calendar will be called for the purpose of entering motions, and of ascertaining what cases are for oral argument, and of setting down the same.

Motions, and such cases as counsel may desire to argue, may be heard during the first week of the term.

Such cases as, upon the call of the calendar, are found to be for

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oral argument and as shall not be set down for the first week of the term, shall be heard in their order upon the calendar, at the rate of two per day, commencing upon the first Monday of the term, unless otherwise directed by the court for special reasons, or unless substitutions shall be made by agreement of counsel and with the consent of court.

RULE XVII

Oral argument—when allowed. Either party may submit a cause on his part on a printed brief or argument, and when no appearance is made on the day of argument, the printed record and briefs being on file, the cause will be ordered so submitted.

In actions for the recovery of money only, or of specific personal property, where the amount or the value of the property involved in the appeal shall not exceed one hundred dollars, and in appeals from orders involving only questions of practice, or forms or rules of pleading, and in appeals from the clerk's taxation of costs, the parties may submit on briefs, but no oral argument will be allowed.

On oral arguments the appellant or plaintiff in error, on a motion the moving party, or party procuring the order to show cause, shall open and be entitled to reply. Each party shall be entitled to one hour in all, except that in actions for the recovery of money only, or of specific personal property, where the amount or the value of the property involved in the appeal shall not exceed five hundred dollars, they shall be entitled to only thirty minutes each, and on motions and orders to show cause, to only fifteen minutes each.

Leave to argue a cause orally, when not entitled to such oral argument under this rule, may be given on application therefor, at the time of calling the calendar. And the time allowed for oral argument, as prescribed by this rule, may be extended on application therefor at the commencement of the argument, notice of intention to apply therefor being given at the time of calling the cause on the call of the calendar, and, on motions and orders to show cause, on application, when brought to a hearing.

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RULE XVIII

Dismissal—certifying to court below. In all cases of the dismissal of any appeal or writ of error in this court, it shall be the duty of the clerk to issue a certified copy of the order of dismissal to the court below, so that further proceedings may he had in such court as if no writ of error or appeal had been brought.

RULE XIX

Remittitur as matter of course Upon the reversal, affirmance or modification of any order or judgment of the district court by this court, there will be a remittitur to the district court unless otherwise ordered.

RULE XX

Remittitur—mailing notice of decision—clerk's fee—entry of judgment—transmitting remittitur. A remittitur shall contain a certified copy of the judgment of this court, sealed with the seal thereof, and signed by the clerk.

When a decision is filed or an order entered determining the cause, the clerk shall mail notice thereof to the attorneys of the parties, and no judgment shall be entered until the expiration of ten days thereafter.

The clerk shall receive a fee of twenty-five cents for each notice of an order made or filed by the court.

The remittitur shall be transmitted to the clerk of the court below as soon as may be after judgment is entered.

(Note—As to remittitur on reversal, see section 4354, R. L. 1905.)

RULE XXI

Costs—amount allowed prevailing party. Unless otherwise ordered the prevailing party shall recover costs as follows:

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1. Upon a judgment in his favor on the merits, twenty-five dollars.
2. Upon dismissal, ten dollars.

[Who is prevailing party. See Sanborn v. Webster, 2 Minn. 277, (323); Allen v. Jones, 8 Minn. 172, (202).]

RULE XXII

Costs—taxation of. Costs in all cases shall be taxed in the first instance by the clerk upon two days' notice, and inserted in the judgment, subject to the review of the court, and the clerk of the court below may tax the costs of the prevailing party in this, when the same are to be inserted in the judgment.

RULE XXIII

Reversal—final judgment without remittitur. On reversal of a judgment of the district court, rendered on a judgment removed into it from an inferior court, when there is no remittitur, this court will render such judgment as ought to have been given in the court below, including the costs of that court, and also for the costs of this court; and the plaintiff in error or appellant may have execution thereupon.

RULE XXIV

Judgment for money only—affirmance—final judgment in this court. In all cases where a judgment of the district court for the recovery of money only, is affirmed, and there is no remittitur, judgment may be entered in this court for the amount thereof, with interest and costs and damages, if any are awarded, to be added thereto by the clerk; and the party in whose favor the same was rendered may have execution thereupon from this court.

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RULE XXV

Reversal—no remittitur—costs of prevailing party. In case of a reversal of a judgment, order or decree of a district court, rendered or made in a cause commenced therein, if there is no remittitur, the prevailing party shall have judgment in this court for the costs of reversal, and the costs of the court below, and execution therefor.

RULE XXVI

Judgment—entry by losing party, or the clerk. In case the prevailing party shall neglect to have judgment entered within twenty days after notice of the filing of the opinion or order of the court, the adverse party, or the clerk of this court, may, without notice, cause the same to be entered without inserting therein any allowance for costs and disbursements, except the clerk's fees.

RULE XXVII

Judgment roll—papers constituting. In all cases the clerk shall attach together the writ of error, if any, the bond and notice of appeal certified and returned by the clerk of the court below, the minutes of argument, and the opinion of the court and order for judgment, and annex thereto a copy of the judgment of this court signed by him; and the papers thus annexed shall constitute the judgment roll.

RULE XXVIII

Remittitur—costs notwithstanding remittitur. In all cases in which a remittitur is ordered, the party prevailing shall have judgment in this court for his costs, and execution thereon, notwithstanding the remittitur.

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RULE XXIX

Executions—issuance and satisfaction. Executions to enforce any judgment of this court may issue to the sheriff of any county in which a transcript of the judgment is filed and docketed. Such executions shall be returnable in sixty days from the receipt thereof by the officer. On the return of an execution satisfied, or acknowledgment of satisfaction, in due form of law, by the party who recovered the same, or his representative, or assigns, the clerk shall make an entry thereof upon the record.

RULE XXX

Process and writs other than executions. All other writs and process issuing from or out of the court shall be signed by the clerk, sealed with the seal of the court, tested of the day when the same issued, and made returnable on any day in the next term, or in the same term, when issued in term time, and a judge may, by an indorsement thereon, order process to be made returnable on any day in vacation, when, in his opinion, the exigency of the case requires it.

RULE XXXI

Rehearing—filing application. Applications for rehearing shall be made ex parte, on petition setting forth the grounds on which they are made, and filed within ten days after notice of the decision.

(Note—The filing of a petition for rehearing stays the entry of judgment in civil cases until the filing of the order of the court thereon, but this does not stay the taxation of costs.)

RULE XXXII

Continuances may be granted for good cause shown.

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RULE XXXIII

Attorneys—guardians ad litem—continue such on appeal. The attorneys and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties, respectively, in this court, until others are retained or appointed and notice thereof served on the adverse party.

RULE XXXIV

Clerks to furnish lists of papers and exhibits. Whenever a clerk of a lower court shall transmit to this court any original papers, files or exhibits as required by chapter 55, Laws 1913, he shall include therewith full and complete detailed lists in duplicate of such papers, files and exhibits. The clerk of this court shall, upon receipt of such papers, files and exhibits enter in his records a list of the same and shall receipt to the transmitting clerk therefor. And when they are returned to the lower court the clerk of said court shall receipt to the clerk of this court for the same.

RULE XXXV

Modification and suspension of rules. Any of these rules may be relaxed or suspended by the court in term or a judge thereof in vacation, in particular cases, as justice may require.

RULE XXXVI

Rules—when to take effect. These rules shall take effect on and after July 1, 1913. All former rules of this court are abrogated, except so far as it may be necessary to follow them upon appeals and writs of error which are pending when these rules take effect.

Adopted March, 1913.

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Chapter 55, Laws 1913.

An Act to amend section 4360, Revised Laws of 1905, relating to returns on appeals to the Supreme Court in Civil Actions.

Be it enacted by the Legislature of the State of Minnesota:

That section 4360, Revised Laws of 1905, be and the same is hereby amended so as to read as follows:

Section 4360. Upon an appeal being perfected, the clerk of the district court shall immediately transmit to the clerk of the supreme court a certified copy of the notice and bond upon appeal, and the filing thereof shall vest in the supreme court jurisdiction of the cause, and upon request of either party, the clerk of the district court shall transmit to the clerk of the supreme court the original record, judgment roll, settled case, or bill of exceptions, and such exhibits as may be on file in his office, the same to remain in the supreme court for its use until the case is disposed of and then returned to the clerk of the district court.

Approved March 17, 1913.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

A. A. WHITE TOWNSITE COMPANY v. CITY OF MOORHEAD and Others.[1]

December 13, 1912.

Nos. 17,729—(82).

Assessment for local improvement — remedy of landowner.

Where, under the charter of a city, the assessment of benefits for public improvements is given to a board of commissioners, with a right of appeal from the assessment to the district court, the owner of property assessed cannot maintain an action to set aside the contract for the improvement and the assessment against his property on any grounds not going to the want of power or jurisdiction on the part of the city to make the improvement, or the assessment. His remedy by a hearing before the commissioners and by appeal is exclusive.

[1] Reported in 138 N. W. 939.

Note.—As to finality of decisions pertaining to local improvements, see note in 19 L.R.A.(N.S.) 382.

For cost of public improvements as indebtedness within debt limit provision, see note in 37 L.R.A.(N.S.) 1072.

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Judicial notice — home rule charter.

The court will take judicial notice of the contents of a home rule charter, and of amendments regularly adopted thereto, certified and deposited as required by law.

Limit of municipal indebtedness.

An amendment to the charter of Moorhead construed and *held* to empower and authorize the city to construct a pavement on and retaining wall along a certain street, notwithstanding that the cost of such improvement would make the indebtedness of the city exceed the limit prescribed by the original charter.

Action in the district court for Clay county to have a certain contract declared void and to set aside certain assessments levied against plaintiff's property for a retaining wall and pavement. From an order, Taylor, J., sustaining defendants' demurrer to the complaint, plaintiff appealed. Affirmed.

Christian G. Dosland, for appellant.

Garfield H. Rustad and *F. H. Peterson,* for respondents.

BUNN, J.

This action was brought by plaintiff to have declared void a contract entered into by defendant city of Moorhead for the construction of a retaining wall and pavement on one of its streets, and to have set aside the special assessments levied against property of plaintiff for such construction. Plaintiff appealed to this court from an order sustaining a demurrer to the complaint.

Does the complaint state a cause of action? Its allegations are in substance as follows:

Plaintiff, a corporation, is the owner of certain lots and tracts of land within the corporate limits of the city of Moorhead, which city in May, 1900, adopted a home rule charter pursuant to article 4, section 36, of the state Constitution, and chapter 351, p. 462, Laws 1899. This charter provides that "the debt of the city shall not be increased, by bonds or otherwise, beyond five per cent of the total value of the taxable property of the city, according to the last preceding assessment for the purposes of taxation." The city is em-

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powered to levy assessments for local improvements, to the extent of benefits only. The bonded indebtedness of the city is $92,000; the total value of the taxable property of the city, according to the assessment for the year 1909, was $1,227,650. On May 25, 1910, the city entered into a contract with one Kennedy, by which the contractor agreed to construct a retaining wall to furnish lateral support to the soil in a street running along the lots owned by plaintiff, and to construct a pavement on such street. For this work the city agreed to pay Kennedy the sum of $14,562.33, and pledged its good faith and credit for such payment. It is alleged that the plans and specifications for the construction of the retaining wall and pavement were wholly inadequate, defective and impractical, for reasons specifically pointed out; that the wall and pavement were constructed under the contract and specifications, but not according to the best and approved engineering methods, in that the wall was constructed of rows of piling and planks, whereas a solid concrete wall extending beneath the quicksand was necessary, in order to prevent the quicksand constituting the subsoil of the street from flowing under the wall, thus causing the pavement to settle. It is alleged that the pavement has settled and will continue to settle, and that it will in a few years be absolutely worthless. The president of plaintiff appeared before the city council when the plans and specifications were under consideration, pointed out the defects, and protested against the construction of the wall and pavement in accordance with such plans and specifications, but his protest was unavailing. The wall and pavement were constructed, and when the commissioners met to assess the damages and benefits, plaintiff appeared and filed written objections against the assessment of any of the cost against its property. Nevertheless, the commissioners wrongfully, unjustly and illegally assessed the entire cost of the wall and a great portion of the cost of the pavement against the property of plaintiff. Its lots assessed are on an average fifteen feet below the level of the street paved; the wall was constructed for the sole purpose of furnishing lateral support for the pavement, at an enormous expense, which was wrongfully, unlawfully and unjustly assessed against plaintiff's property. The assessments against plaintiff's lots

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for the wall and pavement aggregate $2,937.04, which sum is greatly in excess of the value of the lots, and the benefits accruing to them by reason of the construction of the wall and pavement.

The levy and assessment made by the city has been certified by the city clerk to the county auditor of Clay county, and by him entered upon the assessment roll and taxed against plaintiff's property.

It is clear that as to all matters going to show that plaintiff's property was not specially benefited by the improvement, and to show mistakes in the plans and specifications, or in making the assessment, plaintiff is without a remedy in this action. The charter of Moorhead provides that any person, interested in any property assessed for benefits resulting from any improvement, may appeal from such assessment to the district court of Clay county, and such appeal is declared to be the exclusive way in which such assessment can be in any wise reviewed, modified, or annulled. It is alleged in the complaint that plaintiff appeared before the commissioners and filed objections to the assessment of its property, but whether it appealed to the district court from the assessment made does not appear. In any event, such appeal is the sole and exclusive remedy, and whether taken or not, plaintiff cannot attack the assessment in an action for that purpose brought after the improvement is made and the contractor paid. This is true as to all matters that do not go to the power of the city to enter into the contract, and disposes of the entire complaint, except the charge that the city in entering into the contract incurred an indebtedness in excess of the limit provided by its charter.

Plaintiff contends that every contract made with a municipality which creates an indebtedness in excess of the legal limit is absolutely void, and that an assessment levied to pay the cost of work done under such a contract is absolutely void, and so subject to attack in an independent action to set it aside as a cloud on the title to property covered by it. Conceding but not deciding this to be correct, and also that failure to raise the objections before the work is actually completed, and the contractor paid, does not estop plaintiff from now claiming the invalidity of the contract as a ground

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for setting aside the assessment, we are brought to the question whether the contract did create an indebtedness in excess of the limit fixed by the charter of the city at the time the contract was entered into.

As we have stated, the city of Moorhead adopted a home rule charter in May, 1900, which charter fixed the limit of indebtedness at five per cent of the assessed valuation of the city's property. The court will take judicial notice of the provisions of a home rule charter. This was so provided in the Laws of 1899, pursuant to which the city of Moorhead adopted its charter, and the same provision is in all subsequent legislation on the subject. We hold without hesitation that we will take judicial notice of amendments to the charter regularly adopted as well as of the original charter. The law requires amendments adopted by the voters to be certified and a copy deposited in the office of the secretary of state, as in the case of the original charter. An amendment so adopted and certified becomes a part of the charter, and there is no reason for saying that courts will not take judicial notice of such amendments.

It appears that at a special election held May 9, 1910, the voters of Moorhead adopted an amendment to the charter, which was duly certified and deposited as required by law. This amendment expressly authorized the city to construct a permanent pavement on, or otherwise improve, the street in question, and to enter into the necessary contracts for such work, "all provisions of the charter to the contrary notwithstanding." This amendment was adopted shortly before the contract in question was entered into, and its purpose was clearly to make legal the undertaking. So far as we can see the work was not prohibited by the original charter, except that the cost thereof would make the indebtedness of the city exceed the five per cent limit, and it is entirely fair to assume that the purpose of the amendment was to authorize the work notwithstanding the indebtedness limit. It was quite clearly within the power of the people of Moorhead to so amend the charter adopted by them as to authorize the expenditure of money for this improvement, though the limit was exceeded. And we think that the intention to do so is apparent, and that the language of the amendment is sufficiently

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expressive of such intention. It is to be noted that the amendment, as so construed, is not in violation of the Constitution or of the laws prescribing the provisions of home rule charters with respect to the limit of indebtedness permitted.

We agree with the learned trial court that the complaint did not state a cause of action.

Order affirmed.

CAVOUR S. LANGDON v. MINNEAPOLIS STREET RAILWAY COMPANY.

FRANK D. BLAKELEY v. MINNEAPOLIS STREET RAILWAY COMPANY.[1]

December 13, 1912.

Nos. 17,742, 17,743—(76, 77).

Street railway — verdict sustained by evidence.

In an action for damages for injuries received by plaintiff as a result of a collision between one of defendant's street cars and plaintiffs' carriage or cab, the evidence is *held* sufficient to sustain a verdict of negligence against defendant.

Question for jury.

There was evidence tending in a measure to support the charge of wilful negligence, and it is *held*, although the evidence in this respect left the question in some doubt, that there was no reversible error in its submission to the jury.

[1] Reported in 138 N. W. 790.

Note.—As to injuries by street car collisions with vehicles or horses generally, see note in 25 L.R.A. 508.

For evidence as to speed of street cars, see note in 34 L.R.A.(N.S.) 784.

Operating street car at speed in excess of that prescribed by ordinance as negligence or evidence or negligence, see note in 8 L.R.A.(N.S.) 1093.

As to right of motorman to assume that person on track will get out of way, see note in 21 L.R.A.(N.S.) 880.

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Objection to evidence construed.

The general objection that certain documents prepared by defendant's motorman, offered in evidence by plaintiffs, were immaterial and incompetent, and not impeaching, *held* not to raise the question whether the documents were privileged communications between defendant and its employee.

Two actions in the district court for Hennepin county, one by Cavour S. Langdon, as guardian of Bertha Shaw Blakeley, an incompetent person, to recover $50,000 for personal injuries, and the other by Frank D. Blakeley, to recover $40,000 for personal injuries and $10,000 for the loss of the services and society of his wife. The cases were tried together before Dickinson, J., and a jury which returned a verdict in favor of plaintiff in the first action for $33,615.37, and in the second action for $16,026.15. From orders denying defendant's motions for judgment notwithstanding the verdict in each case or for a new trial, it appealed. Affirmed.

John F. Dahl, W. O. Stout and *N. M. Thygeson,* for appellant.

Butler & Mitchell, for respondents.

BROWN, J.

These two actions, brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant, were consolidated and tried together in the court below resulting in verdicts for plaintiffs. Defendant appealed from an order denying its alternative motion for judgment or a new trial.

On November 20, 1908, at about seven o'clock in the evening, plaintiffs, husband and wife, were proceeding from their residence in the city of Minneapolis, in a cab or closed carriage, hired by the husband for the particular occasion, to the residence of a neighbor residing a short distance away, and while crossing Nicollet avenue, along and upon which defendant operates its line of street railway, at the intersection thereof with Franklin avenue, the cab was struck by a street car with such force and violence as to totally demolish the vehicle and inflict upon plaintiffs serious and permanent injuries. Plaintiffs charged in their complaints that the accident and resulting injury to them were caused solely from the negligent operation of the street car in this: (1) That it was run at an excessive and

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unlawful rate of speed; (2) that no warning of the approach of the car was given by sounding the car bell or otherwise; (3) that the car was not under proper control as it approached the street crossing; and (4) that defendant was guilty of wilful negligence, in that the motorman in charge of the car failed to exercise reasonable care to avert the collision after discovering plaintiffs' peril. Defendant by its answer put in issue the charge of negligence on its part, and affirmatively alleged that the accident was occasioned by the negligence of plaintiffs and the driver of the cab who, the answer further alleged, was their agent and servant. The trial below centered around the question of defendant's negligence in the respects alleged in the complaint, and the damages suffered by plaintiffs. There was no evidence of negligence on the part of plaintiffs and the court instructed the jury that the negligence of the cab driver was not imputable to them. So that the defense of contributory negligence was eliminated from the case. The jury returned verdicts for both plaintiffs.

It is contended on this appeal, in support of the claim that the court below erred in denying defendant's motion for judgment notwithstanding the verdict, that the evidence wholly fails to make a case of negligence on the part of defendant in any of the respects alleged in the complaint. In support of the motion for a new trial it is contended, (1) that the court below erred in certain of its rulings on the admission and exclusion of evidence, and in its charge to the jury, and (2) misconduct on the part of plaintiffs' counsel.

1. We find no difficulty in concurring with the trial court that the evidence made the question of defendant's negligence one of fact for the consideration of the jury. The street car causing the injury to plaintiffs was being operated upon Nicollet avenue, over and across which are extended numerous streets and avenues much frequented and used by the public, though the evidence of the motorman was to the effect that there was little travel upon the side streets at that particular hour of the day. The car was proceeding south, and at the intersection with Franklin avenue, the place of the accident, and for some distance below, up a grade. The evidence tends to show that the car was being run at an excessive rate of speed; the

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witnesses differing in their estimates all the way from fifteen to thirty-three miles an hour. It also tends to show that the motorman in charge failed to sound the gong or bell of his car, or otherwise give warning of the approach of the car, as he neared the street crossing; that the same speed of the car was maintained up to the time of the collision, hence that the car was not under proper control. This evidence, if satisfactory to the jury, justified the conclusion of a negligent operation of the car, and that such negligence was the proximate cause of the injury to plaintiffs. Shea v. St. Paul City Ry. Co. 50 Minn. 395, 52 N. W. 902; Holmgren v. Twin City Rapid Transit Co. 61 Minn. 85, 63 N. W. 270; Smith v. Minneapolis Street Ry. Co. 95 Minn. 254, 104 N. W. 16. A further discussion of the evidence upon this subject would serve no useful purpose.

There is nothing unusual in the facts presented, or which differentiates the case from the ordinary case of a collision at a street intersection between a street car and a passing vehicle. The evidence tended to show the excessive speed of the car, the failure to give the usual warnings of its approach, and the failure of the motorman to have proper control of the car, where control was necessary. The motorman was bound to anticipate the probable presence of pedestrians or vehicles at street crossings of the location and character of this one, and it was incumbent upon him to so manage his car that a collision with a vehicle, should one appear, could, if possible, be averted. It was also his duty to give the usual warnings of the approach of the car, and to limit the speed thereof to that prescribed by law as not dangerous or excessive. It is urged that the signals alleged to have been omitted by the motorman would have been unavailing had they been given; that it was not negligence to fail to give such warning, for the approaching car could plainly have been seen by the driver of the cab long before he reached the car track. It is probable, had the action been by the driver of the cab to recover for his injuries, defendant's contention would be well founded. But the cab driver's conduct is not involved in the action. The court below charged the jury that his negligence could not be charged to plaintiffs, and of that instruction no complaint is made. Plaintiffs,

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within the closed carriage, had the right to assume that defendant would discharge its full duty to the traveling public; that it would give timely warning of the approach of its cars at street intersections, operate its cars at a proper rate of speed and keep them under reasonable control at points where pedestrians or vehicles might be expected to suddenly emerge from side streets. The negligence of the cab driver may be conceded, but that does not relieve the defendant from its negligence, under the law of the case as stated in the instructions of the court.

2. Defendant complains of the reception in evidence of exhibits "I" and "J". Exhibit "I" was a report of the accident made by the motorman to defendant the day following, and stated from the viewpoint of the motorman the facts and conditions surrounding the same. Exhibit "J" was a chart or plat made by the motorman showing the situation, the location of the car following the collision, the location of the cab and the bodies of the injured parties and, as we understand it, the point at which the motorman first noticed the oncoming cab. It was brought out on the cross-examination of the motorman that these documents had been made by him or under his direction, and upon request of counsel for plaintiffs counsel for defendant produced them. They were made the basis of some further cross-examination, and were then offered in evidence. They were objected to by defendant as incompetent and immaterial, and not impeaching in character. We think the documents as against the particular objection were properly received in evidence. They were in substance and effect declarations of the witness made soon after the accident, and were in some respects at least at variance with the testimony given by him at the trial. Exhibit "I," the report of the accident, contained no reference to the claim made by the witness on the trial that the horses attached to the cab were running away, or approaching the street "on the jump," and tended to contradict him in that respect. If the horses were in fact running away, it is fair to assume that that witness would have referred to that fact in his written report to the company. We hold that the documents were, as against the particular objection, properly received in evidence. The further contention that they were inadmissible because in the nature

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of a confidential communication, and therefore privileged, (Booth, Street Railways, 399) was not included in the objection made on the trial and cannot therefore be considered. The objection that the documents were "incompetent and immaterial, and not impeachment," did not call to the attention of the trial court the point now made that they were privileged. Graves v. Bonness, 97 Minn. 278, 107 N. W. 163.

3. The question whether the court erred in submitting to the jury the issue of wilful negligence, presents the only other subject requiring special mention. Our examination of the record discloses no error of a character to justify a new trial, unless it be this particular instruction. We have given this feature of the case careful consideration, and as a result thereof hold, conceding the doubtfulness of plaintiffs' claim that they were entitled to a submission of the question to the jury, that no prejudice resulted therefrom.

There was some evidence tending directly to show a failure on the part of the motorman to exercise reasonable care to avert the collision after discovering plaintiffs' peril. He discovered the carriage coming toward the car track on a run, a clear indication that the driver thereof did not intend to stop for the car to pass, if he noticed it coming, or could not do so because the horses were running away, as the motorman supposed, and it was, in view of the situation, incumbent upon the motorman immediately to take measures to avoid a collision, or in some manner draw the attention of the cab driver to the fact that the car was approaching. The precise distance between the cab and car, when the motorman was first apprised of the situation, was a question in some dispute on the evidence. But there was evidence that no effort to stop the car was made until the time of the collision. Passengers on the car testified that efforts to stop the car were made at the moment the collision occurred and not before. The witnesses so testifying, particularly one of them, who through the car window noticed the approaching cab, were in position to judge, with some degree of accuracy, whether the efforts to stop the car and the collision were simultaneous. The force and effect of this evidence, considered in connection with the circumstances presented, and the

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testimony of the motorman on the subject, were for the jury to determine.

It may be conceded that the evidence, taken as a whole, does not leave the question entirely free from doubt. But since the negligence of defendant in other respects charged in the complaint was, as to plaintiffs, shown by ample and sufficient evidence, it seems beyond question that no prejudice resulted from the submission of the particular question. It is not at all probable that the jury considered that feature of the case, the evidence upon the other branches of negligence, as to plaintiffs who were not responsible for the conduct of the cab driver, being so clear and free from doubt. Had the evidence of negligence in the other respects been doubtful an entirely different question would be presented. There was no fair doubt in that respect. The case of Bloomquist v. Minneapolis St. Ry. Co. 113 Minn. 12, 129 N. W. 130, is not in point. The trial court there refused to submit the question of wilful negligence, and the refusal was sustained. Wilful negligence was, in that case, the only basis upon which plaintiff therein could recover, the jury having found adversely to him upon all other questions. That is not the situation in the case at bar. We therefore hold that there was no error in the submission of the particular question to the jury. There was some evidence to support it, and, in any event we are clear that it was not prejudicial.

4. We find no ground for reversal in the alleged misconduct of plaintiffs' counsel in his address to the jury. The attention of the trial court was not directly called to any prejudicial statements, no ruling invoked, nor exception noted, and the case comes within the rule applied in State v. Frelinghuysen, 43 Minn. 265, 45 N. W. 432; Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492; Ludwig v. Spicer, 99 Minn. 400, 109 N. W. 832.

This covers all the assignments calling for special mention and results in the conclusion that no reversible errors were committed on the trial, and the order appealed from must be affirmed.

Order affirmed.

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JOHN WUNDER v. CLAUDE A. P. TURNER.[1]

December 13, 1912.

Nos. 17,781—(103).

Specific performance — evidence — new trial.

Action to enforce specific performance of an alleged oral contract with reference to an invention relating to reinforced concrete construction and the assignment of an interest in patents to be obtained therefor. The trial court found that in fact the contract was never made. *Held*, that the evidence sustains the court's findings of fact; that it did not err in sustaining an objection to offered evidence of prior art patents, nor in denying plaintiff's motion for a new trial on the ground of newly discovered evidence.

Action in the district court for Hennepin county to compel defendant to assign to plaintiff an undivided ½ interest in the letters patent of the United States, No. 589,585, and in the pending application for letters patent in the U. S. No. 378,444, filed June 11, 1907; an undivided ½ interest in said letters patent upon the same invention issued to defendant in Great Britain, Canada and Mexico; and to account for ½ of all profits and royalties obtained and received by him from the use of the invention in the United States, Great Britain, Canada and Mexico. The case was tried before John Day Smith, J., and subsequently submitted on typewritten record to Booth, J., who made findings and as conclusion of law ordered judgment in favor of defendant. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

A. C. Paul, Emanuel Cohen and *A. B. Jackson,* for appellant.

Frank R. Hubachek, Frank W. Booth and *Charles J. Williamson,* for respondent.

START, C. J.

This is an action in equity brought by the plaintiff in the district court of the county of Hennepin to enforce the specific performance

[1] Reported in 138 N. W. 770.

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of an alleged oral contract, with reference to an invention useful in connection with reinforced concrete construction, and patents to be obtained covering such invention. The complaint alleged the making of the oral contract, and that it was thereby agreed that the defendant should invent and devise a method of construction which would provide a reinforced concrete structure having flat slab floors, thereby dispensing with the use of girders or beams, for supporting the floors; that patents upon the construction were to be obtained in the defendant's name, the plaintiff paying the cost of securing them; that defendant and plaintiff should share equally in all profits to be derived from such patents, or any one thereof; and, further, that defendant should, on plaintiff's request, assign to him an undivided one-half interest in each of the inventions and patents; that the invention was made and patents secured therefor in defendant's name; and, further, that the alleged contract was broken by the defendant. The plaintiff prayed for judgment for an accounting of profits and that the defendant assign to him an undivided one-half interest in the patents. The answer denied the making of the alleged oral contract.

The cause was tried by the court without a jury. At the close of the evidence the argument of the cause was postponed until a later date, but the judge was then unable, by reason of his illness, to hear arguments and finish the trial. Thereupon, by agreement of the parties, the case was argued and submitted, upon the evidence which was typewritten, to another judge of the court, Hon. Wilbur F. Booth, hereafter referred to for convenience as the trial judge. He found, with other facts not here material, the ultimate facts following:

"That the alleged contract set out in the plaintiff's complaint was never in fact entered into, and that no contract relating to said alleged invention, or relating to any patent issued or to be issued therefor, either in the United States or elsewhere, was ever made or entered into between the parties to this suit."

As a conclusion of law it was found that the defendant was entitled

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to judgment in his favor on the merits. Thereupon the plaintiff made a motion for additional findings of fact, which was denied. He also made a motion for a new trial, which was denied, and the plaintiff appealed from the order denying it.

The plaintiff's assignments of error in this court raise the questions, whether the ultimate and controlling finding of fact, which we have quoted, is sustained by the evidence; whether the court erred in its rulings as to the admission of evidence, or in denying the motion for a new trial on the ground of newly discovered evidence. The plaintiff also assigned twelve other alleged errors, all relating to the refusal of the trial court to make, as requested, twelve additional findings of strictly evidentiary facts, for example, whether the defendant testified falsely in material particulars in respect to a certain exhibit.

A trial court is only required to find ultimate facts, and in this case it rightly refused to make the findings requested. Butler v. Bohn, 31 Minn. 325, 17 N. W. 862.

The principal question presented by the record for our decision is whether the finding of fact, that the alleged oral contract was never made, is sustained by the evidence. The plaintiff urges in this connection that, inasmuch as the evidence was not taken by the judge who made the finding and the case was submitted to him on the report of the stenographer of the evidence in the form of a typewritten copy thereof, he was in no better position than this court to arrive at the real weight of the evidence and the merits of the respective contentions, hence the rule applicable ordinarily to cases of this kind should be relaxed. The finding was made by the trial court in the exercise of its original jurisdiction, but the jurisdiction of this court in reviewing the finding is purely appellate and we must determine the question of law whether the finding in question is sustained by the evidence within the rule, which is this: Findings of fact by a trial judge are entitled to the same weight as the verdict of a jury, and will not be reversed on appeal unless they are manifestly contrary to the evidence.

The rule applies to inferences from undisputed facts, to documentary evidence, and to cases submitted on depositions or on the report

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of a referee appointed to take and return the evidence. 1 Dunnell, Minn. Dig. § 411; Cornish, Curtis, & Greene Co. v. Antrim Co-op. Dairy Assn. 82 Minn. 215, 84 N. W. 724; Treat v. Kellogg, 104 Minn. 54, 115 N. W. 947; Northwestern F. & M. Ins. Co. v. Connecticut Mut. F. Ins. Co. 105 Minn. 483, 117 N. W. 825.

This rule does not relieve the appellate court from the duty of giving the evidence in every case a careful examination and consideration, as a basis for its determination of the question whether the evidence fairly brings the case within the rule. We have so examined and considered the evidence in this case, aided by the able memoranda of the learned trial judge and the exhaustive and efficient briefs of respective counsel, and have reached the conclusion that the evidence sustains the finding in question. The evidence is voluminous, filling some two thousand pages of the printed record, which makes this case a proper one for the application of the rule that it is not the duty of an appellate court to demonstrate, by a review of the evidence, the correctness of findings of fact by the trial court. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757.

The next contention of the plaintiff is that the court erred in sustaining defendant's objection to the admission of evidence of prior art patents offered by him. A consideration of this claim requires a brief reference to the conflict in the testimony of the respective parties. They were alone at the time plaintiff claims that the oral contract alleged in the complaint was made. The plaintiff testified to conversations between the parties tending to show that the contract was made as claimed by him. The defendant testified to the effect that no contract, relating to the invention and the patents therefor, known as the flat slab or mushroom construction, alleged in the complaint, was ever made. There was therefore no direct evidence as to whether the alleged contract was made by the parties, except their respective testimony which was in this respect radically conflicting. Such being the case, evidence of collateral facts having a direct tendency to show that the testimony of the one was more reasonable and credible than that of the other was admissible, subject to the exercise of a fair discretion of the trial court in the premises. Philips v. Mo, 91 Minn. 311, 97 N. W. 969.

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A great volume of evidence of such collateral facts was offered by the respective parties in the case and rightly received, in view of the importance of this case and the sharp conflict in the direct evidence, relevant to the issue whether the alleged oral contract was ever made. It is claimed by the plaintiff that it was reversible error to sustain the defendant's objection to the admission of evidence of the prior art patents, for the reason, with others of like kind, that it was necessary for the court to understand exactly the patentable features of the flat slab or mushroom invention at the time the alleged oral contract was made, in order to apply the testimony to the oral contract. We are unable to concur in this view of the offered evidence, for the scope or validity of the invention and patent therefor which is claimed constituted the subject matter of the alleged contract, or the scope or character of prior art patents, has but little, if any, relevancy to the question whether the oral contract was made as plaintiff claimed. In any event we are of the opinion that in the last analysis the question in this connection is, whether the court abused its discretion in rejecting the evidence. We hold that the ruling of the court in sustaining the objection was not reversible error.

The last contention of the plaintiff is that the trial court erred in not granting a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence related to collateral facts. It was cumulative and some of it newly remembered. We are of the opinion that the trial court did not abuse its discretion in denying the motion for a new trial on the ground of newly discovered evidence.

Order affirmed.

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NUMO VANEFF v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 13, 1912.

Nos. 17,856—(93).

Negligence of fellow servant — evidence — verdict.

Evidence in an action based upon the claim that a fellow servant of the plaintiff negligently pushed him off a crowded handcar, thus causing the injuries complained of, considered and *held* sufficient to sustain a verdict for the plaintiff after its approval by the trial court.

Action in the district court for Otter Tail county to recover $15,500 for personal injuries. The case was tried before Taylor, J., and a jury which returned a verdict in favor of plaintiff for $900. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

J. D. Sullivan and *M. L. Countryman,* for appellant.

Thomas D. Schall and *M. J. Daly,* for respondent.

Philip E. Brown, J.

Action to recover damages claimed to have resulted from the defendant's negligence and also that of a fellow servant of the plaintiff. The plaintiff had a verdict for $900, and the defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The complaint alleged that the plaintiff was employed as a section hand by the defendant, and that while riding on one of its handcars in the performance of his duties, near Crookston, the car was run at excessive and dangerous speed, and was so overcrowded and overloaded that a fellow workman thereon, in endeavoring to change his position, negligently jostled the plaintiff, thereby causing him to fall from the car and be injured. The defendant admitted its employment

[1] Reported in 138 N. W. 1027.

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of the plaintiff as a section man, denied all other claims made by him, and alleged, in defense, his contributory negligence and assumption of risk.

The plaintiff was a Macedonian, and had lived in this country for about four years prior to the accident. His knowledge of our language was confined to his ability to speak a few words, his testimony being given through an interpreter. It appeared from the uncontradicted testimony that he worked for the defendant as a section hand from June 18, 1911, until July 8 following, and that on the latter date, in the evening, he rode towards Crookston on a handcar, the same being one of those in common use by the defendant and being four feet four inches wide and six feet long, with the customary propulsion frames and handles in the center. A number of shovels and other articles were on the car. After traveling several miles, and when the car had arrived at or near the point where the plaintiff and some of his fellow workmen sometimes left it, the plaintiff, who had been standing on the front end of the car assisting in pumping with his right hand, either fell or jumped off between the rails in front of the moving car, and was injured. The plaintiff claimed that there were fourteen men on the car, besides the foreman, during the journey on which the accident occurred, six section men, of whom he was one, being on the front end of the car, six on the rear, and two, together with the foreman, in the center. The defendant claimed in this regard that there were only twelve men on the car, including the foreman, four being at each end and four in the center. The plaintiff claimed that the six men on the front end of the car stood sidewise, he being on the outside corner, with their backs close to each other's breasts, crosswise of the car, and that the man standing in front of him, whose name was Tham Meik, but whom we will designate as Tham, without indicating his intention so to do, released his hold on the handle bar and turned completely around, thus causing the plaintiff to fall from the car. The defendant, while admitting that the men stood sidewise on the front end of the car as claimed by the plaintiff, denied that he stood on the outside corner or that he was pushed or jostled from the car, or that he fell therefrom, and claimed that he, while pumping with his right hand,

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turned around, jumped backwards from the car with both feet at the same time, and fell upon his back between the rails.

The questions of the alleged excessive speed of the car and the overcrowding of the same, were not submitted to the jury, and the court gave the following instructions among others as a part of the general charge:

"If he (plaintiff) slipped and fell because his fellow workman next in front of him negligently pushed him, and he is not chargeable with contributory negligence himself, he is entitled to damages for whatever injuries he may have sustained."

"If the man next in front of the plaintiff failed to exercise such ordinary care, but carelessly turned and pushed plaintiff so that he fell, you can find that he was negligent, and, if his negligence caused the accident, and there was no contributory negligence on the part of plaintiff himself, the defendant is responsible in damages."

"If you find that this man did negligently push him and cause him to fall and do not find that the plaintiff himself is chargeable with contributory negligence, he is entitled to a verdict."

The plaintiff does not claim that these instructions are improper in form, but makes the point that their impropriety consists in the absence of evidence to sustain them, and moreover that, if there was any such evidence, yet it was manifestly and palpably insufficient to sustain the verdict rendered. These claims, and likewise the defendant's other assignments of error, raise the sole question: Was the evidence insufficient to warrant a finding that a fellow workman carelessly, unexpectedly, and without warning, turned and changed his position on the car, thus jostling the plaintiff so that he fell therefrom?

The general principles applicable to the instant case are settled by the cases of Hider v. Minneapolis, St. P. & Sault Ste. Marie Ry. Co. 115 Minn. 325, 132 N. W. 316, and Steffenson v. Chicago, M. & St. P. Ry. Co. 51 Minn. 531, 53 N. W. 800. Furthermore, by analogy, these cases practically determine the instant case adversely to the contentions of the defendant. The facts of these two cases

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parallel those of the instant case to a remarkable degree, each of the three cases being an action by a section hand to recover for injuries sustained from a fall from a slowly moving, crowded handcar. In each case the car was being slowed down, with a view of letting some or all of the men off. In each the plaintiff fell on his back, between the rails, in front of the car, with his feet towards the car. The facts of the two cases to which we refer are summarized and compared by Mr. Justice Brown at page 327 of the opinion in the Hider case, as follows:

"We are unable to distinguish the case from Steffenson v. Chicago, M. & St. P. Ry. Co. 51 Minn. 531, 53 N. W. 800. That case was before the court on three separate appeals. On the first it was held that the railroad fellow servant statute (Laws 1887, p. 69, c. 13) applied to section men while employed in operating a handcar furnished them by the company for use in their work. 45 Minn. 355, 47 N. W. 1068, 11 L.R.A. 271. The negligence charged in that case was substantially that in the case at bar, namely, overloading the car, and negligence of a fellow servant. On the second appeal it was held that the evidence failed to show negligence in overloading the car, and the cause was remanded for a new trial upon the question of the negligence of a fellow servant. 48 Minn. 285, 51 N. W. 610. On the third trial the jury found negligence in the conduct of the fellow servant, and the verdict was sustained. 51 Minn. 531, 53 N. W. 800. The act there charged as negligence was the sudden and unexpected turning around by one of the men on the car for the purpose of setting the brake and bringing the car to a stop, which resulted in pushing plaintiff from the car. In the case at bar the negligent act was that of two of the men suddenly and without warning jumping from the car while in motion, thus unexpectedly releasing plaintiff's support and causing him to fall from the car. There is no substantial difference between the two cases, and we follow the former decision."

And so, in the instant case, we think the two former decisions above cited should be followed. The Steffenson case is peculiarly in point, for besides the identity of facts above noted, which we have

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gathered from the opinion in 51 Minn. 531 and also from the record and briefs in the case, it appears that the defendant's contention there was the same as in the instant case, namely, that the plaintiff jumped off the car. See page 19 of appellant's brief in the Steffenson case (Cases and Briefs Supreme Court, October Term 1892, Case No. 115). In that case, furthermore, it appeared from the record that warning was given that the car was about to stop, and that the brake was about to be applied by the member of the plaintiff's crew who usually applied it and who, as claimed by the plaintiff, pushed plaintiff from the car in so doing, it being also held that the setting of the brake was necessary, whereas in the instant case it appears from the testimony of the defendant's own witnesses that nothing was said by the men on the car just prior to the accident, and no claim is made that the act of the workman in changing his position was necessary. It is true that, in the instant case, there was direct testimony tending to support the defendant's theory that the plaintiff jumped off the car, but at most this merely created a conflict, to which we will refer later, for the plaintiff testified positively in support of his theory that he was pushed off the car by Tham. As said in the Steffenson case, at page 533: "As to the fact of negligence, the case presented by the plaintiff was not a strong one, but the issue was so doubtful upon the evidence that we think that the verdict must be accepted as final."

In view, however, of the conflict in the evidence in the present case, which must be admitted to be of a more direct nature than in the two cases above cited, though we do not think it is more real, we will discuss the evidence herein in more detail than was done in those cases. To sustain its contention, the defendant quotes in its brief certain testimony given by the plaintiff, and if this were all of the testimony in the record to sustain the plaintiff's contention that he was jostled so that he fell from the car, or was a fair summary of the evidence in this regard, it would be very doubtful whether the court was warranted in submitting the case to the jury. It appears that the plaintiff was examined at considerable length through an interpreter who was not proficient in our language, and his testimony, when taken apart, shows all the customary inconsistencies which ac-

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company testimony so taken. The defendant insists, furthermore, that the plaintiff's statement that a fellow workman shoved him off the car, was the result of a leading question. But in other portions of the record the plaintiff makes the same statement, both on direct and indirect examination, and it is entirely clear from his whole testimony that such was his claim, and it cannot fairly be said that it was prompted by his counsel. Neither do we think that such claim is improbable (see Steffenson v. Chicago, M. & St. P. Ry. Co. supra), and while no witness testified in support of the plaintiff's account of the accident in his behalf, it appearing that several of his fellow workmen who saw the accident had left the locality, yet his claim was materially supported by the inconsistencies in the accounts given by the defendant's witnesses. Thus, the foreman was at first very confident as to the number of men on the car at the time, and the number at work in his gang during all the time plaintiff was a member thereof, which testimony he gave by reference to his book; but, though this book is not in the record, it appears from his cross-examination that there were times, during the period in question, when there were fifteen men at work in this gang. Again, one Wekne, the other witness besides Tham and the foreman, who testified as to the details of the accident in behalf of the defendant, persisted that he did not see the car strike the plaintiff, and Tham testified that the car did not strike the plaintiff; whereas the foreman testified that the car did strike him. There was likewise a distinct discrepancy between the testimony of these witnesses as to the place where the accident occurred with reference to the plaintiff's boarding place, and also discrepancies in regard to other matters; and in contrast with the uncertainty of these witnesses with regard to many other matters which must have been equally within the field of their observation, the certainty and positiveness with which they all three testified that the plaintiff turned and jumped backwards from the car with both feet at the same time, is at least worthy of note. How, then, can it be said that the jury was bound to discredit the plaintiff's testimony and version of the accident, because there were discrepancies therein and because it was opposed by the testimony of the three witnesses above mentioned?

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As to the negligence of Tham, the fellow workman whom the plaintiff claims jostled him and made him fall from the car, we do not think that it can be said that no negligence was shown. It requires little, if any discussion, to demonstrate that if there were either four or six men, including the plaintiff, on the front end of the moving car, standing sidewise and grasping the handle bar, on a space four feet four inches wide—packed together much like sardines in a box —if any of them turned around without warning another might easily be jostled thereby. Such an act, then, might constitute negligence outside of the risks assumed by the workman so jostled, if it should be held that he did assume any. Said Mr. Justice Brown, at page 328 of the Hider case, supra:

"The question of assumption of risk was for the jury. While it is clear that plaintiff assumed all risks incident to the overcrowded condition of the car, as he had worked under similar conditions for a considerable time, it cannot be held that he assumed the risk of negligent conduct of his fellow servants. The statute protects him from their negligence. Nor can it be held as a matter of law that plaintiff was guilty of contributory negligence by taking a position on the front end of the car with four other men. It was necessary that five men stand on one or the other end of the car, and whether plaintiff should have taken some other position was a question for the jury."

In answer to the defendant's contention that there was no suggestion that the movement of the plaintiff's fellow servant was made without warning or was unexpected, it is sufficient to say that it appears, as above stated, from the testimony of the defendant's own witnesses, that there was no talk whatever between the men preceding the accident. Let us, then, examine briefly the defendant's affirmative claim, detailing the circumstances of the accident. As stated, this is in effect that the plaintiff voluntarily released his hold, turned so that his back was towards the direction in which the car was going, and then jumped backwards from the car and upon the track in front of the moving car. The only reason suggested by the defendant for this extraordinary action on the plaintiff's part is that

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this occurred while the car was slowly moving and was near the place where the plaintiff and some of his fellow workmen ordinarily alighted to go to their boarding place, a contention strikingly similar to that of the defendant in the Steffenson case, supra, and which, in that case was discredited by the jury. The court, in the instant case, instructed the jury substantially that, if they found such claim to be true, they would have to find for the defendant. Manifestly, therefore, in view of the verdict, the jury were not impressed with this contention, and neither are we.

The only witnesses who testified concerning the accident, in behalf of the defendant, were the section foreman, the man named Tham, whom the plaintiff claims pushed him off the car, and Wekne, a young man who had been in this country less than a month. As we have already stated, there are quite as many discrepancies in their accounts of the accident, to say the least, as can be found in the plaintiff's testimony; and we think that, upon the entire record, there is nothing inherently unreasonable in the plaintiff's theory of the case and nothing that necessarily discredits his account of the accident. Nor do we think that the defendant's theory is so much the more probable or supported by such an overwhelming weight of evidence, as to require us to say, or even to justify us in saying, that the jury was manifestly and palpably wrong in accepting the plaintiff's version of the accident. Curiously enough, while arguing the improbability of the plaintiff's version and the absence of negligence on the part of the defendant, the defendant charges, in effect, that the plaintiff did the identical thing which he claims that his fellow servant did, namely, released his hold on the handle bar and turned around without warning. Loosening the hand hold and turning around might have been done without thought or anticipation of the consequences, and yet might well be held by the jury to have been dangerous to the other men and likewise negligent, when the crowded condition of the men on the car is considered. But jumping backward from the car in the manner in which the defendant claims the plaintiff did, would be deliberate folly. That the plaintiff would deliberately jump backward immediately in front of the heavily loaded, though slowly moving, car, is unlikely, and, further, is at least more improbable than

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that he was jostled from the car in the manner claimed by him. The jury, moreover, after hearing the evidence and the witnesses, and seeing the numerous physical demonstrations of the details of the accident which the record shows occurred at the trial, were in a much better position to determine the truth of the respective contentions of the parties than we are. We find no good reason for disturbing the verdict, after the trial court has refused to do so.

Order affirmed.

STATE v. LOUIS SCHUELLER.[1]

December 13, 1912.

Nos. 17,857—(5).

Verdict sustained by evidence.

In a prosecution for rape upon a female child under the age of consent, the evidence is *held* to support the verdict of guilty.

Evidence of prior acts.

Evidence of acts of intercourse between the parties immediately prior to the time relied upon by the state for conviction, and other than the act so relied upon, *held* competent and proper as tending to corroborate the charge made by complainant.

Evidence of subsequent acts.

Whether evidence of subsequent acts is admissible for the same purpose, quære? but the admission thereof under the circumstances stated in the opinion, *held* not prejudicial to defendant.

Defendant was indicted by the grand jury of Stearns county of carnally knowing and abusing a female child under the age of sixteen years, and tried before the district court for that county, Taylor,

[1] Reported in 138 N. W. 937.

Note.—Impeachment of character of prosecutrix for chastity by proof of prior acts of intercourse with defendant, see note in 30 L.R.A.(N.S.) 173.

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J., and a jury which returned a verdict of guilty. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

John R. Donohue and *William F. Donohue,* for appellant.

Lyndon A. Smith, Attorney General, and *J. B. Himsl,* County Attorney, for the State.

BROWN, J.

Defendant was convicted of the crime of rape upon a female child under the age of sixteen years and appealed from an order denying a new trial.

There is no controversy in the evidence that the child alleged to have been violated was about fourteen years of age, and under the age of consent, and no question that she became pregnant as the result of intercourse with some one at about the time charged in the indictment. Defendant was charged with being that person. And, though he denied having any improper relations with the girl, our examination of the record leads to the conclusion that the evidence made the question one of fact, and justified the jury in finding defendant guilty. We do not refer to the evidence in detail. It is unnecessary. The fact of intercourse with complainant, by defendant, probably with complainant's innocent consent, was shown by competent evidence, and the conviction must be sustained unless the record presents some reversible error in the rulings of the court on the trial.

1. The county attorney, in his opening statement to the jury, said that the state expected to show that defendant had sexual intercourse with complainant on several occasions during the months of August and September, 1911; the date charged in the indictment was September 10, 1911. Whereupon counsel for defendant moved for an order requiring the state to elect, if there was more than one act of intercourse, upon which act reliance would be had for conviction. The motion was denied and defendant excepted. The evidence offered was in harmony with the opening statement of the county attorney, and disclosed several acts of intercourse between the parties, all having taken place in the latter part of August and the early part of September, one of which occurred after the date mentioned in the

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indictment. When the state rested, defendant again moved for an order requiring the state to elect upon which of the several acts of intercourse testified to the state would rely. The motion was granted, and the county attorney stated that reliance would be had upon the first act in September, the date of which was named in the indictment as September 10. Defendant at the same time moved to strike from the record all evidence of other acts of intercourse, which motion the court denied.

2. We discover no error in the refusal of the court to require the state at the opening of the trial to select a particular act of intercourse as the basis of the prosecution, and upon which reliance would be had for conviction. The indictment named September 10, 1911, as the date of the offense, and the only basis for the motion to require an election was the opening statement of the county attorney that he expected to prove several acts of intercourse at about that date. We think the motion was addressed to the sound discretion of the trial court, in the exercise of which we discover no abuse. It is not a case of several distinct offenses charged in separate counts in the indictment, but a case of one offense, and a single charge. There was no suggestion below that defendant intended to interpose the defense of an alibi, and the refusal of the court to require the state to fix upon some definite and specific act, in advance of the evidence coming in, in no way prejudiced defendant in the preparation or presentation of his defense, which consisted solely in a denial of improper relations with complainant. There was therefore no error in this ruling. State v. Willette, 78 Vt. 157; State v. Parish, 104 N. C. 679; Com. v. Barnes, 138 Mass. 511; State v. Acheson, 91 Me. 240.

The case of State v. Masteller, 45 Minn. 128, 47 N. W. 541, cited and relied upon by defendant is not in point. All that was before the court in that case was the question whether, after the state has offered its evidence relative to the commission of the crime charged and rested its case, and after a motion for a directed verdict by defendant on the ground that the evidence failed to show a public offense, the prosecution may then be permitted to reopen its case and present evidence of another and distinct offense, and sustain a conviction thereon. What was said in the opinion in that case had

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reference to that state of facts. It is not, properly considered, an authority for the contention of defendant, that in a case of this character, an election must be ordered by the court at the opening of the trial, when requested so to do by the prisoner on trial.

There are authorities supporting defendant's contention. State v. Flaherty, 162 N. Y. 532; State v. Palmberg, 199 Mo. 233. But we prefer the rule of discretion, particularly in a case where there is no claim of an alibi, or other suggestion that knowledge of the precise date of the act is essential to the preparation or presentation of the defense.

3. Defendant further contends that the trial court erred in overruling objections to testimony tending to prove several acts of intercourse between the parties, and also erred in denying the motion to strike from the record all evidence of such acts save the one the state, at the close of the case, elected to rely upon for conviction. This contention is founded upon the general proposition that evidence of an offense, or offenses, separate and distinct from that upon which the defendant is on trial, is inadmissible against him. The rule is elementary and is applied by all courts, except where the evidence tending to show the separate and distinct offense tends also to corroborate in some substantial degree the specific charge made the basis of the indictment on trial.

The rule has not, however, been applied strictly in prosecutions for the so-called "sexual crimes," such as rape, adultery, incest and seduction. In that class of prosecutions the rule has been most liberally extended. Nearly all the courts admit evidence of other acts of intercourse in such cases, occurring before the date mentioned in the indictment, on the theory of disclosing the relationship between the parties, opportunity and inclination to commit the act complained of, and as corroborative of the specific charge. See note to People v. Molineux, (168 N. Y. 264) 62 L.R.A. 193, 329; Grabowski v. State, 126 Wis. 447, 105 N. W. 805; Blair v. State, 72 Neb. 501, 101 N. W. 17; People v. Abbott, 97 Mich. 484, 56 N. W. 862; State v. Trusty, 122 Iowa, 82, 97 N. W. 989. We follow and apply this rule, and hold that there was no error in the refusal of the court to strike out the evidence of prior acts of intercourse between complainant and

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defendant. We may say however that evidence of this character should be confined to reasonable limits as to time, and be not of acts or conduct so remote as to render its corroborative force doubtful and uncertain. To what extent the state may go in this direction must rest in the sound discretion of the trial court. It should in no case be extended to matters having no relation in character to the charge made in the indictment. Whether the rule applies to a rape by force we need not determine.

4. The authorities are not in harmony upon the further question whether acts committed subsequent to the date relied upon for conviction are admissible. The evidence is held admissible by several courts of high standing. State v. Sebastian, 81 Conn. 1; Woodruff v. State, 72 Neb. 815, 101 N. W. 1114; People v. Castro, 133 Cal. 11, 65 Pac. 13; State v. King, 117 Iowa, 484, 91 N. W. 768. The majority of the courts, however, though admitting evidence of prior acts, exclude evidence of those occurring subsequent to the date charged in the indictment. It may well be doubted whether there is any real or substantial basis for the distinction. Yet we do not deem it necessary to determine the question in the case at bar. It appears from the evidence in the record before us that four acts of intercourse occurred between these parties, the precise date of any one of which complainant was unable to give. She was at that time under the age of fourteen years, and could not be expected to give accurate dates of occurrences happening some time prior to the trial. She testified that two of the acts took place the latter part of August, and two early in September, but she did not know the day of the week or the day of the month. That one act was subsequent to the date charged in the indictment appears only from the fact that the county attorney elected, at the close of the state's case, to rely for conviction upon the first act testified to by complainant as having occurred in September. Whether the second September act was as a matter of fact subsequent to the tenth, the date named, the evidence is not clear. In any event we are clear that no prejudice resulted from the refusal of the court to eliminate the evidence of that occurrence. All acts of intercourse took place within a period of four or perhaps five weeks; those happening before the date

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charged were admissible, and that happening thereafter, made so by the election of the county attorney, doubtful on the authorities, but its retention in the case was without prejudice.

5. The other assignments do not require special discussion. There was no error in the refusal of the request to instruct the jury in reference to the rule of *falsus in uno falsus in omnibus*. The request incorrectly stated the rule, omitting the essential of wilfulness, and it would have been an erroneous statement of the law had it been given. State v. Henderson, 72 Minn. 74, 74 N. W. 1014. The court was not required to correct the request and make its language conform to the rule, and the evidence was not of a character to require the court of its own motion to draw the attention of the jury to the rule. The alleged error in the date of the offense, as charged in the indictment, is without merit.

This covers all that it is necessary to say. We have fully considered all assignments of error, and discover no reason for granting a new trial, and the order appealed from must be affirmed.

Order affirmed.

JOHN TEGELS v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 13, 1912.

Nos. 17,858—(89).

Question for jury.

Evidence, in an action for the death of a pedestrian at a railway crossing, considered, and *held* sufficient to take the case to the jury upon the question as to whether the defendant's employees in charge of its train were guilty of negligence in failing to give the necessary and statutory signals.

[1] Reported in 138 N. W. 945.

Note.—As to presumption of care of person killed at railroad crossing, see note in 4 L.R.A.(N.S.) 344.

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Failure to produce witness.

The jury, in such action, had the right to consider the defendant's failure to produce as a witness the fireman of the engine which struck the deceased, in determining the truth of the engineer's testimony that he signaled by whistle and that the fireman rang the bell.

Contributory negligence — question for jury.

It appearing, in such action, that the accident occurred at night, and that the view in the direction from which the train approached was somewhat obstructed by buildings, and there being evidence tending to show that the night was hazy, that the headlight of the engine was dim, that the train was running fast and made little noise, and that no signals were given for the crossing, the question of contributory negligence on the part of the deceased was for the jury, especially in view of the presumption of due care on the part of a deceased person killed by the negligence of another.

Damages not excessive.

Verdict for $3,250 sustained.

Action in the district court for Lyon county by the administrator of the estate of Stephen Tegels, deceased, to recover $5,200 for the death of his intestate. The answer admitted that one of defendant's locomotives struck Stephen Tegels with such force and violence that he died shortly after, and alleged that his death was due to his own negligence. The reply was a general denial. The case was tried before Olsen, J., and a jury which returned a verdict in favor of plaintiff for $3,250. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Winsor & Keith and *M. L. Countryman,* for appellant.

Tom Davis, Ernest A. Michel and *D. L. Kennedy,* for respondent.

Philip E. Brown, J.

Green Valley is a flag station on the defendant's line of railway. At about two o'clock in the morning of November 16, 1910, the deceased, who had been attending a dance in Green Valley, together with five other young men, left the dance hall and proceeded, on foot, towards the place where they had left their horses and vehicles, which was on the opposite and west side of the railroad track

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from the place where the dance was held, and near a crossing about 100 feet south of the station, where the track was intersected by a highway running east and west. Their course was diagonal from the dance hall, in a northwesterly direction, to a point on the above-mentioned highway about 200 feet from the hall, which distance they ran. From this point they proceeded to walk westerly to a point on the east side of the track near the crossing. The track at this point runs almost north and south, and is straight and practically level for a long distance south of the highway; but to the south and on the east side of the track are the defendant's water tank, depot, and outhouse. The night was "kind of hazy." The deceased, plaintiff's son and intestate, while crossing the track upon the highway at the aforesaid crossing, was struck and killed by an engine, pulling a passenger train, which approached from the south. This action is for the recovery of damages for the death of the plaintiff's son and intestate, caused as above stated. The plaintiff had a verdict, and this is an appeal by the defendant from an order denying its alternative motion for judgment or for a new trial.

1. The defendant claims that there was no evidence of any negligence on its part. The plaintiff's contention in this regard is (1) that the train which struck the plaintiff's son was running at a dangerous rate of speed; (2) that the engine had an insufficient headlight; and (3) that no warning was given of the train's approach to the crossing, either by sounding of whistle or ringing of bell, or otherwise.

The first and second grounds of negligence thus urged cannot be considered on this branch of the case, for the complaint in the action alleges merely that the defendant was guilty of negligence in the operation of its train generally, and the court, in its charge, limited the plaintiff's claim as to the defendant's negligence solely to the alleged failure to give the statutory signals, thus rendering claims not so submitted immaterial.

As to the claim that the necessary and statutory signals were not given, four witnesses testified, on behalf of the plaintiff, that they were present when and where the accident occurred, such witnesses being companions of the deceased as above mentioned, and that they

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were in a position to have heard signals, if such had been given, and heard none. On the part of the defendant, the engineer testified that he gave the usual signal whistles, and that his fireman rang the bell. The fireman was not sworn, and the defendant offered no other evidence on this issue. We are of the opinion that the question was properly for the jury. The defendant offered no explanation of its failure to produce the fireman as a witness, and the jury had the right to consider this in determining the truth of the engineer's testimony. Fonda v. St. Paul City Ry. Co. 71 Minn. 438, 452, 74 N. W. 166, 70 Am. St. 341; Hall v. City of Austin, 73 Minn. 134, 139, 75 N. W. 1121; Barnes v. Shreveport, 47 La. An. 1218, 17 South. 782, 49 Am. St. 400; Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. 370.

2. The next claim made by the defendant is that the deceased was guilty of contributory negligence.

In addition to the facts already stated, it appeared, or there was evidence sufficient to warrant a finding to the effect, that the deceased, who was 21 years old and possessed of normal senses of hearing and sight, had lived near Green Valley for many years; that the engine of the train in question was equipped with an oil burning headlight, which at the time of the accident, was dim, "like a lantern turned down;" that the engine was pulling several lighted passenger coaches; that no stop was made at the station; that the train made little noise in approaching, was behind time, and was running about 40 miles an hour, and that another train was due at Green Valley from the north at about the same time; that the engineer did not see the accident, and did not know until the following day that the deceased had been struck; that at the point where the deceased started to cross the track his view was somewhat obstructed by the buildings referred to above. None of the four witnesses, who were with the deceased, saw or heard the train until it was almost upon them, though they looked and listened for trains on approaching the crossing; and there was no direct evidence that the deceased failed to look and listen.

The immediate circumstances of the accident were as follows: Two of the companions of the deceased reached the track before he did,

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and both crossed it safely. One of them did not see the engine until he was on the track. Both of these young men succeeded in getting across; but the deceased, who followed immediately after them, was struck and killed, after having gotten almost across. The other two of the deceased's companions who testified were so near the track that they were almost run down.

This court has quite recently announced, in two cases, the rules governing the consideration of the question of contributory negligence on the part of a deceased person, under conditions similar to those in the instant case, and these rules have been followed in subsequent cases. The cases to which we refer are Knudson v. Great Northern Ry. Co. 114 Minn. 244, 130 N. W. 994, and Anderson v. Duluth & I. R. R. Co. 116 Minn. 346, 133 N. W. 805.

In the Anderson case the rule is stated as follows: "A very strong presumption of fact arises, where one is killed by the negligence of another, that he used due care to save himself from personal injury or death; and in such cases the question of his negligence is always one of fact, unless the undisputed evidence so conclusively rebuts the presumption that honest and fair-minded men could not reasonably draw different conclusions therefrom."

In the Knudson case the rule is stated and applied as follows: "The question then is: Does the evidence so clearly and so conclusively establish the intestate's contributory negligence that fair-minded men could not draw any other conclusion therefrom? If the accident had happened in the sunlight, but one conclusion could be fairly drawn from the evidence, namely, that the intestate must have been guilty of contributory negligence. Such, however, is not this case; and we are of the opinion, in view of the conditions under which the intestate attempted to cross the railway tracks, that the question of his negligence was one upon which fair-minded men might well differ."

The concluding sentence last above quoted expresses our views of the instant case.

3. The only other assignment of error undisposed of, is that the verdict is excessive, the same being for $3,250. It appeared that the deceased was unmarried, and lived with his parents, rendering

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services on his father's farm, and also contributing about $100 a year to his parents. We find no occasion for disturbing the verdict, after its approval by the trial court.

Order affirmed.

GERTIE HENDRICKSON v. GRAND LODGE A. O. U. W.

December 13, 1912.

Nos. 17,935—(94).

Fraternal insurance order — knowledge of officer.

An officer of a fraternal insurance order represents such order in the performance of the duties of his office, so that his knowledge and action in reference to a matter within the scope of such duties, in the absence of fraud, may be considered as the knowledge and action of the order.

Prohibited occupation — waiver of forfeiture.

A by-law of the defendant, a fraternal insurance company, provided that if a member should enter into the business or occupation of selling at retail intoxicating liquors as a beverage his membership should cease, and the insurance certificate and all rights thereunder should become forfeited. Plaintiff's husband, a common laborer, while a member, accepted work in a village saloon as a temporary substitute for the bartender for five or six weeks, during which time he paid an assessment that came due on the membership certificate. This assessment was accepted and retained by the officers of the local lodge. Three days after the insured quit the said temporary employment he died. After his death, and with knowledge of his said employment, defendant's grand recorder requested further proof, not

[1] Reported in 139 N. W. 946.

Note.—On the question whether a breach of an insurance policy which *ipso facto* terminates it may be waived, see note in 25 L.R.A.(N.S.) 78.

As to waiver by subordinate lodge of right of benefit association to insist upon forfeiture of benefit because of violation of laws of association, see note in 10 L.R.A.(N.S.) 136.

For waiver of provision as to change of occupation by continued receipt of dues, see note in 27 L.R.A.(N.S.) 446.

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only as to his occupation, but as to burial. Assuming that the temporary employment forfeited the insurance, it is *held* that the trial court's finding that there was a waiver of the forfeiture is sustained by the evidence.

Action in the dictrict court for Wright county against the Grand Lodge of the Ancient Order of United Workmen to recover $2,000 on defendant's benefit certificate. The defense set up in the answer and the substance of the reply are to be found in the second paragraph of the opinion. The case was tried before Giddings, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff for the amount demanded. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

William B. Anderson, for appellant.

Woolley & Johnson, for respondent.

HOLT, J.

The defendant is a so-called fraternal insurance association, and plaintiff sues to recover on the policy or membership certificate of insurance issued by defendant to her deceased husband, whereby defendant, in case of his death, agreed to pay her $2,000. The case was tried to the court, and findings made directing judgment in favor of plaintiff. From the judgment thereupon entered, defendant appeals.

The defense was that plaintiff's husband, the insured, had entered a prohibited occupation—that of selling intoxicating liquors at retail—which ipso facto annulled the insurance contract. Plaintiff pleaded in reply, and the court found, that defendant waived the forfeiture by accepting and retaining an assessment on the policy with knowledge that the insured was engaged in the prohibited occupation, and also that after the death of the insured, and after being informed that he had been so employed, defendant again waived the forfeiture by requesting plaintiff to furnish additional proof of death, which she did, at some expense and trouble.

The defendant challenges the waiver found, and the consequent conclusion of law that the policy sued on is a subsisting contract, entitling plaintiff to judgment.

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It is by no means clear that a forfeiture ever occurred in this case. Section 98 of the by-laws of the order enacts that any member "who shall hereafter enter into the business or occupation of selling, by retail, intoxicating liquors as a beverage shall, by his so entering into such business or occupation, alone and without any action" by the grand or local lodge, or any officer of either, stand suspended, and, from and including the day upon which he so enters into such business or occupation, his beneficiary certificate shall be void, and all rights thereunder shall be forfeited. This provision is viewed somewhat differently than one which does not undertake to absolutely abrogate the policy. For instance, stipulations are found in some insurance contracts which declare that, if the insured should enter a more hazardous occupation, a loss directly traceable thereto is not covered by the policy, and in other policies it reduces the recovery. This distinction appears in the two cases of Abell v. Modern Woodmen of America, 96 Minn. 494, 105 N. W. 65, 906, and Johnson v. Modern Brotherhood of America, 109 Minn. 288, 123 N. W. 819, 27 L.R.A.(N.S.) 446. Entering into the prohibited calling does not merely suspend, or modify, but absolutely annuls, the insurance here in question.

If there be any uncertainty in the wording of a contract which attempts such dire consequences to the insured, courts construe it so as to avoid a forfeiture.

One definition given by the lexicographers of the word "occupation" is: "That to which one's time and attention are habitually devoted." The court found that the insured was a common laborer, who for five or six weeks prior to his last illness had found temporary employment to tend bar in a saloon while the regular bartender went out to operate a threshing engine. Whenever the latter returned, the insured was to quit. The bartender returned, and the insured left the employment the day before he was taken ill. No claim is made that his illness or death two days thereafter was in any measure due to his previous employment in the saloon. There are those whose regular employment is that of selling intoxicating drinks at retail for others, ordinarily called bartenders, and probably it is a fair construction of the by-law referred to to say that it was intended to ex-

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clude bartenders, as well as saloon keepers, from membership in the order. But it will hardly be claimed that every member of the order who might enter upon the sale of intoxicating drinks for however short a period, or under every circumstance, is thereby ipso facto expelled. In some of the restaurants and cafés of our large cities a waiter sells and serves more intoxicating drinks in a day than would some temporary bartender in a village saloon in a week, and yet we doubt whether this order, or any court, would say that such waiter, by reason of his employment, could not retain his membership, if he had one. The by-law does not use the expression "employed in or assisting in the sale," which might have been expected if the intention was to exclude from membership others than those who, as saloon keepers, engaged in selling intoxicating drinks. So that it may be contended, and with reason, that it is not clear that one who temporarily acts as a substitute for a bartender does, within the meaning of this by-law, enter into the business or occupation of selling at retail intoxicating liquors as a beverage.

Courts rightly construe the language of an insurance contract of even a fraternal organization most favorably to the insured, when the writing is susceptible of two constructions, one of which results in a forfeiture, and the other in the enforcement of the policy. Finch v. Grand Grove U. A. O. D. 60 Minn. 308, 62 N. W. 384. And this principle is again announced and exemplified in the facts upon which the decision in Cook v. Modern Brotherhood of America, 114 Minn. 299, 131 N. W. 334, is based.

We shall not, however, place our decision of this case upon the ground that the work which the deceased took up temporarily in the saloon was not a violation of defendant's by-law which forfeited his membership, because no claim was made by plaintiff in this case that the insured's occupation was not prohibited. What has been said above as to the doubtful effect of the insured's employment may be sufficient to indicate that neither he nor any one of those who acted for defendant with knowledge of the true situation is to be charged with an attempt to defraud, either in the payment or acceptance of the assessment. We then come to the evidence, viewed in the light

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of legal principles, to see if the trial court was warranted in predicating a waiver of the forfeiture set up as a defense.

It is settled law that forfeiture of an insurance policy or contract may be waived. Mee v. Bankers Life Assn. 69 Minn. 210, 72 N. W. 74, and cases there cited. And this is so, notwithstanding provisions to the contrary in the contract, as in the case here. Andrus v. Maryland Casualty Co. 91 Minn. 358, 98 N. W. 200. Waiver is defined as an intentional relinquishment of a known right. Therefore there can be no waiver here, unless knowledge that the insured had entered upon the prohibited occupation was brought home to defendant, or to those who, in a legal sense, represent it, and, possessing such knowledge, an act was done, or a position assumed, which indicates an intention to consider the contract of insurance as still in force. Parsons, Rich & Co. v. Lane, 97 Minn. 98, 106 N. W. 485, 7 An. Cas. 1144.

The defendant is a corporation, and hence must of necessity act through officers or agents. That the local lodge is agent of defendant, in the matter of collecting and remitting assessments, so that if such lodge knew of the work the insured was engaged in, and, so knowing, received and remitted the September assessment, waiver would have resulted, cannot be successfully controverted. Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728. We do not, however, regard knowledge or inaction of some, or even a majority, perhaps, of the members of the local lodge as important, or such as would affect defendant, inasmuch as no duty to enforce discipline or collect assessments is imposed on the individual members. But the local lodge, to the knowledge of defendant, acts through its officers, so that such lodge, and through it defendant, may be bound by the knowledge and conduct of such officers acting in the discharge of their duties.

The defendant relies on Graves v. Modern Woodmen of America, 85 Minn. 396, 89 N. W. 6, for the rule that an officer of a local lodge cannot, by any act of his, waive a right of the grand lodge. When that decision, as well as that of Elder v. Grand Lodge A. O. U. W. 79 Minn. 468, 82 N. W. 987, also cited, is examined in the light of the facts therein, we do not think there is any departure from the

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principle that an agent, when acting within the scope of his employment, in the absence of fraud, represents his principal, so that the knowledge and doings of the agent conclude the principal. In neither the Graves nor the Elder case had the agent acted on the matter which caused the forfeiture. The dues or assessments were in default, and the attempt was made to show that the condition in the insurance contract which provided for forfeiture on default had been waived by the conduct of the collecting officer of the local lodge in receiving assessments after default on previous occasions. But the facts also established that the lodge never recognized such a custom, but, on the contrary, insisted on prompt payment. The officer's violation of his instruction, not known to or recognized by the lodge, was held not to be a waiver of the condition of the policy as to future assessments. The officer had no authority to establish a custom for the lodge as to when future payment should be made; but, as to an act required of an officer of a local lodge in its behalf, it should shoulder the consequences.

In this case the only one ordained to receive the assessments was the financier, and the master workman was the officer whose duty it was to take care that payment of the sums collected was promptly remitted to the grand lodge. It would seem that these officers, in accepting the assessments from the insured and remitting to defendant, are not mere machines, but do their work with reference to the rights and duties, not only of the members, but of defendant and the local lodge, to which they report in detail; and knowledge obtained in the performance of these duties is the knowledge of the local lodge and defendant.

To hold otherwise would be to relieve the officers and agents of an association like defendant, and defendant also, of all responsibility, and throw it on its members. The officers of the local lodge are elected by the members because of confidence in their ability and integrity to represent the lodge and act for it in the discharge of their several duties. Such is the holding of the courts in Pringle v. Modern Woodmen of America, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231, Collver v. Modern Woodmen of America (Iowa) 135 N. W. 67, Supreme Court of Honor v. Sullivan, 26 Ind. App. 60, 59 N.

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E. 37, and the cases referred to therein. This rule appears to us more conducive to just results than the one apparently adopted in Brown v. Great Camp K. M. M. 167 Mich. 123, 132 N. W. 562.

The financier of the local lodge of the insured in the case at bar was charged with the duty of collecting and remitting to defendant the assessments against members. In the middle of September, 1910, when the insured was employed, as stated, in a saloon, he paid the last assessment (none other came due prior to his death). Owing to a change previously made by him in the amount of insurance and beneficiary, the financier could not then determine the exact amount, but received more than sufficient to cover it, and returned the surplus, together with a proper receipt, to the insured October 4, 1910.

The insured resided, as did also the financier and master workman of the local lodge, at Hancock, Minnesota, which is a small village of some 500 inhabitants. One-half of the members of the local lodge resided in the village, and the other half in the adjoining farming district. The financier of this local lodge was employed in the bank, situate where the two principal streets of the village intersect, and the saloon in which the insured worked was less than a block away on one of these streets. It was admitted that the financier would testify that he did not know that the insured was so employed till after his death; but we cannot say that the trial court was bound to accept this as true, in view of the situation and other evidence in the case. The master workman of the local lodge was in the saloon, and saw that the insured worked therein about two weeks prior to his death, but did not suggest to him that his membership in the order was annulled or imperiled by the employment.

One duty of the master workman of the local lodge is to "take care that all beneficiary funds, the per capita tax, and all claims of the grand lodge upon the said subordinate lodge are forwarded, as required by the provisions of this constitution, or paid promptly, as the case may be." The financier is required to collect all assessments and dues, and keep accurate account with each individual member, report to the lodge, and pay these over to the receiver. If, then, the master workman performed his duty in taking care that all

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assessments were promptly forwarded or paid, there was room for the trial court to find that this September assessment, paid by the insured while employed as temporary bartender, was accepted and retained with knowledge of the true facts on the part of the master workman. We think that the master workman and financier of the local lodge act in respect to the receipt, retention, and forwarding of assessments, as the agent of the defendant, and, in the absence of fraud, their knowledge and conduct in regard to a waiver of forfeiture may properly bind the defendant; the provision in its constitution and by-law to the contrary notwithstanding.

In addition, another circumstance supports the finding of waiver. It appears that in each local lodge there is an officer known as "District Deputy Grand Master Workman," appointed by the master workman of the grand lodge from among those members in the local lodge who have attained the rank of past master workman. This officer shall be, as far as his authority extends, a representative of the grand master workman in the local lodge. He "shall promptly report to the grand master workman any violation of their duties by the officers" of the local lodge, or any illegal action by the lodge itself. This district deputy grand master of the local lodge well knew the insured, who worked for him prior to the employment in the saloon, and knew that he was so engaged temporarily while the regular bartender was out threshing. This officer did not discuss the bearing the insured's employment had upon his membership, because it was so short and temporary that he considered it had no effect thereon. Failure of these officials, representing the defendant, to appreciate that a forfeiture of insured's membership had occurred, if it ever did, when the assessment was accepted and retained, would none the less constitute waiver, if he knew the true facts. Their misapprehension of the legal result would not prevent their acts, with full knowledge of the actual situation, from constituting a waiver, if otherwise such were the consequences.

The court also found a waiver in that, after knowledge of the facts constituting the alleged forfeiture, defendant required additional proof of death at expense and trouble to plaintiff. Defendant contends that this finding is unsupported by the evidence. The facts

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appear to be these: After the death of the insured, she requested the financier of the local lodge to assist her. He had blank proofs of death provided by defendant. Plaintiff gave the necessary information for him to fill in the answers to the questions found in the blank proofs of death; then she signed and swore to the same before him. One of the questions requiring an answer was whether the insured had at any time been engaged in the sale by retail of intoxicating liquor as a beverage, and other enumerated employments, and, if so, when? The answer was, "Engaged in retail liquor for several weeks as assistent bartender." As a part of this proof of death the master workman, the financier, and recorder also appended a certificate as to the insured's age, standing in the order, illness, death, funeral, and other details, stating therein that: "His occupation when taken sick, or when last engaged, was assistant bartender several weeks." Although this certificate by the principal officers of the local lodge fully covered the place of death, and burial attended by 18 members of the lodge, the grand recorder, on receipt of these proofs, wrote plaintiff that it appears therefrom "that the deceased was engaged in the retail liquor traffic for several weeks as assistant bartender. Kindly fill in the dates when he engaged, and if he was engaged in the liquor traffic at the time of his death. * * * There is no proof as to where the deceased was buried." Plaintiff thereupon obtained proof from the undertaker at some trouble and expense of 25 cents, and also gave information by letter as to the time the insured was working in the saloon.

The contention of defendant is reasonable that, where an answer called for by a question in a proof of loss or death is indefinite, so that it is left in doubt whether the contract under which a claim is made is forfeited or not, the insurer, by calling for additional and definite proof in that respect, does not in any sense waive a forfeiture. And if the proof furnished had contained only plaintiff's answer touching the insured's occupation, or if the additional proof called for had related to that feature alone, we should hold unhesitatingly that no waiver followed a demand and compliance therewith. But here the certificate of the officers of the lodge, a part of the proof, clearly showed that, if the employment of the insured did forfeit

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the insurance, it had taken place. In that situation the grand recorder, not only called for more detail upon this subject, but also requested proof as to burial. While it is true that the grand recorder does not pass on the proof, or the right of the beneficiary to the insurance, he is nevertheless the agent of defendant in receiving proofs, and it is undoubtedly understood that he acts within the scope of his duties, and therefore in behalf of the Grand Lodge when requesting additional proof.

Although the law abhors forfeitures, and is eager to lay hold of a reason to avoid so declaring, we confess to a reluctance in holding that, after loss, an insignificant outlay and effort imposed by the insurer upon the beneficiary is a waiver of the forfeiture. But if it be imposed with knowledge of the facts establishing the forfeiture, the conduct is inconsistent with any other position than a waiver, and a recognition of the subsistence of the contract, and such waiver becomes binding when the beneficiary complies with the condition imposed. We cannot say that there is no evidence to sustain the finding that, by calling for and obtaining the additional proof of burial after full knowledge that the forfeiture now claimed existed, the defendant has waived such forfeiture.

The judgment must be affirmed.

JOHN GILBERT v. CHARLES J. GILBERT and Another.[1]

December 13, 1912.

Nos. 17,970—(154).

Limitation of action — demurrer.

The bar of the statute of limitations is not available on demurrer, unless it clearly and unequivocally appears from the face of the pleading attacked that the statute has run against the cause of action alleged.

Same — demurrer to amended complaint.

Assuming, without deciding, that where the original complaint states one cause of action, and an amended complaint, which takes the place of the

[1] Reported in 138 N. W. 943.

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original, states another and different cause, the action must be treated as begun at the time of the service of the amended complaint, the rule is not applicable to this case, for the original and amended complaints relate to one and the same cause of action in substance. So construed, the action stated in the amended complaint must be treated as instituted at the time of the service of the summons, and a demurrer thereto, upon the ground that the statute of limitations had run before the service of the amended complaint, was rightly overruled.

Action in the district court for Polk county to recover $8,498.50 for conversion. From an order, Watts, J., overruling defendants' demurrer to the amended complaint, they appealed. Affirmed.

Eric O. Hagen, for appellants.

Peterson & Adams, for respondent.

HOLT, J.

Appeal from an order overruling a demurrer to an amended complaint.

The original complaint appears to have been served in October, 1907. In substance the cause of action therein alleged is this:

On December 4, 1902, plaintiff owned certain lands in Polk county, which he employed one Rosaaen to sell. It was then thought that this could be done more advantageously by conveying the lands to Rosaaen. Rosaaen was unable or unwilling to sell, and on September 26, 1903, it was mutually agreed between plaintiff and defendants that they should pay to Rosaaen such amounts as the latter had paid out at plaintiff's request for interest on incumbrances, taxes, and abstract fees in connection with the land, and should obtain a conveyance from Rosaaen, and thereafter sell the lands for and on account of plaintiff, and out of the proceeds reimburse themselves for the amounts paid to Rosaaen, and also retain a reasonable commission for selling the lands, and account and pay to plaintiff the balance of the proceeds of the sale. It is stated that defendants under the agreement paid Rosaaen $426.50 and procured a deed from him to the defendant Charles J. Gilbert for the lands, which defendants thereupon undertook to sell. Shortly thereafter they sold one piece, and received $525, and on or about October 27, 1905,

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disposed of the balance, receiving in payment from the purchaser, on or about January 6, 1906, certain hardware and merchandise of the cash value of $8,400. It is alleged that thereafter, and on or about January 6, 1906, defendants converted said merchandise to their own use.

In February, 1912, plaintiff at a general term asked for and obtained leave to serve an amended complaint; but when, on March 13, 1912, such pleading was served, defendant returned it on the ground that a different cause of action from the one set out in the original complaint was stated. However, the court, by order dated May 4, 1912, permitted the proposed amended complaint to be substituted for the original. Thereupon defendants demurred, on the ground that several causes of action were improperly united, and that the facts stated in the amended complaint do not constitute a cause of action.

The amended complaint, after alleging, substantially as in the original, plaintiff's ownership of the lands and the agreement under which the conveyance was made to Rosaaen, alleges more in detail the agreement between plaintiff and defendants under which defendants were to pay Rosaaen what he had advanced for plaintiff, take a conveyance of the lands, and sell the same for plaintiff, reimburse themselves for the money paid to Rosaaen, retain a reasonable commission for selling, and account and pay over to plaintiff the balance. The amended complaint then avers that plaintiff was the father of defendants, old and unused to business matters; that he was at the time greatly depressed on account of the death of his wife, the mother of defendants; that defendants were active business men, and plaintiff relied upon them, not only as sons, but on their integrity and ability as business men; and that he was hard pressed for money, and believed defendants would be able to handle the business better than he could. It is further alleged that defendants, in order to procure the conveyance to be made to them, represented to plaintiff that if he would cause the title to said lands to be placed in their name they would be able rapidly to dispose of the same, and would do so, and faithfully account to him for the proceeds; that plaintiff relied on these representations, but that the defendants made them in bad faith, for the express purpose of cheating and defrauding plaintiff out of

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the lands, and pursuant to such purpose they paid to Rosaaen on September 26, 1903, $426.50 and procured from him a warranty deed running to defendant Charles J. Gilbert. A sale, on or about October 27, 1905, of a piece of these lands is then averred to one Hamilton for $525, out of which defendants reimbursed themselves for the money paid to Rosaaen, and also that thereafter, and on or about October 27, 1905, said defendants sold the remaining portion of said land to one L. E. Larson for the sum of $8,400, which was the value of plaintiff's equity therein, which sum defendants wilfully appropriated and converted to their own use, and refuse to account for or pay over any part to plaintiff. Judgment is asked for $8,400 and interest from January 6, 1906.

No claim is now made that the amended complaint is demurrable because several causes of action are improperly united, so that the sole question is: Does the amended complaint state facts constituting a cause of action?

The appellants claim the original complaint was for conversion, but the amended complaint states an entirely different cause of action, namely, one in fraud and deceit; hence the action cannot be deemed to have been begun until the amended complaint was served, and since it appears that the defendants obtained the property through the alleged fraud and deceit more than six years before the service of the amended pleading, and no allegation is contained therein that plaintiff did not discover the fraud until within the six years from the service of the amended complaint, the demurrer was well taken. We may assume for the purpose of this decision that by serving an amended complaint the action, as far as affected by the statute of limitations, must be considered as begun at the time of the service of such complaint, and not as of the time of the service of the summons. Nevertheless, we think the demurrer was properly overruled.

A complaint is not demurrable on the ground that the statute of limitations has run against the cause of action alleged therein, unless it clearly and unequivocally appears therefrom that such is the case. Kennedy v. Williams, 11 Minn. 219 (314); McArdle v. McArdle, 12 Minn. 53 (98); Davenport v. Short, 17 Minn. 8 (24); Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693; Humphrey v. Carpenter, 39

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Minn. 115, 39 N. W. 67, down to the case of Thornton v. City of East Grand Forks, 106 Minn. 233, 118 N. W. 834. Under this rule it may be doubtful whether an allegation that the act upon which the action is predicated took place on or about a certain date fixes that date as the one from which the statute begins to run. Lockwood v. Bigelow, 11 Minn. 70 (113).

But we do not need to determine that proposition, for, as we construe the original and amended complaints herein, the latter does not state a new or different cause of action. The relation of the parties, and the element of alleged deception introduced in the amended complaint, may be regarded as surplusage or inducement to the real cause of action, namely, the conversion of the proceeds of plaintiff's lands. Under both complaints it clearly appears that plaintiff intended to place the title to his lands in defendants to facilitate the sale thereof. The defendants were acting exactly in accordance with plaintiff's desires and their employment in making the sales and receiving the proceeds. Although defendants may have been actuated by bad faith from the first, they did nothing contrary to plaintiff's instructions or in opposition to his interests until they failed to account and pay over the proceeds of the sale to plaintiff. In neither pleading does plaintiff ask to have the conveyances set aside, or seek to recover from defendants the value of the land. The only difference is that in the original complaint the allegation was that defendants received a hardware stock worth $8,400 for plaintiff's equity, and they converted that to their own use, while in the amended complaint the averment is that defendant received $8,400, which they converted and failed to pay over or account for.

The court correctly disposed of the demurrer.

Order affirmed.

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CHARLOTTE R. SMITH v. CITY OF CLOQUET.[1]

December 20, 1912.

Nos. 17,721—(62).

Liability for ice and snow on sidewalks.

Though mere slipperiness from the accumulation of ice and snow upon the streets and sidewalks of a municipality does not create a liability for injuries received in consequence of that condition, there may be a liability where the municipality negligently permits an accumulation of ice and snow to such an extent and for such a time that slippery and dangerous ridges, irregularities, and depressions are formed therein from travel thereon, or other causes, thus rendering the street or walk unsafe and dangerous for public use.

Verdict sustained by evidence.

Evidence held sufficient to support a verdict of liability within the rule stated.

Action in the district court for Carlton county to recover $1,065 for personal injuries. The complaint, among other matters, alleged that plaintiff, on the day mentioned, was "lawfully walking along said sidewalk * * * in a careful manner," when, owing to its slippery and uneven condition, she fell and was hurt. The answer was a general denial. The case was tried before Dibell, J., and a jury which returned a verdict in favor of plaintiff for $225. Defendant's motion for judgment notwithstanding the verdict or for a new trial

[1] Reported in 139 N. W. 141.

Note.—As to the liability of a municipal corporation for injuries from rough or uneven ice or snow accumulated from natural causes on a street or sidewalk not otherwise defective, see note in 13 L.R.A.(N.S.) 1105; and on the question of liability for injuries from smooth, level ice or snow, see note in 7 L.R.A.(N.S.) 933.

The authorities on the general question of the liability of a municipality for injuries from snow and ice on streets or sidewalks, are reviewed in notes in 21 L.R.A. 263 and 20 L.R.A.(N.S.) 656.

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was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

J. A. Fesenbeck, for appellant.

Walter L. Case, for respondent.

BROWN, J.

Action for personal injuries alleged to have resulted from the negligence of defendant. Plaintiff had a verdict, and defendant appealed from an order denying its motion for judgment or a new trial.

The injury of which plaintiff complains was received by her on December 12, 1910, by falling upon one of the sidewalks of the city, and it is her claim that the walk at this point was in a defective condition by reason of the accumulation of ice and snow which, by travel and otherwise, had become rough and uneven, and dangerous and unsafe for public use. She further claims that this condition of the walk was caused by the negligence of the city in failing properly and seasonably to remove the snow and ice, and to keep and maintain the walk in reasonably safe condition for public use.

It is well settled by the authorities that mere slipperiness of streets and sidewalks, caused by an accumulation of ice and snow, creates no liability for injuries to persons in consequence of that condition. It is equally well settled that, where ice and snow are permitted to accumulate and remain upon the streets and walks to such an extent and for such a time that slippery and dangerous ridges, irregularities, and depressions are formed therein from travel or other causes, thus rendering travel thereon unsafe, the municipality may be liable, if that condition is brought about by its neglect. Henkes v. City of Minneapolis, 42 Minn. 530, 44 N. W. 1026; Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 819; Keane v. Village, 130 N. Y. 188, 29 N. E. 130; McAuley v. City, 113 Mass. 503; Broburg v. City, 63 Iowa, 523, 19 N. W. 340, 50 Am. Rep. 756; Cook v. City, 24 Wis. 270, 1 Am. Rep. 183.

The question in the case at bar is whether the evidence made a case for the jury within this rule of liability. Defendant contends that the evidence is wholly insufficient. We have carefully read the record, and concur with the learned trial court that the evidence, though

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by no means conclusive, was sufficient to take the case to the jury, and that it supports the verdict. The sidewalk had been used by boys for coasting, and was a much frequented thoroughfare. A sloping ridge, four or five inches high, had been formed in the center of the walk, and there was evidence of unevenness and roughness caused by travel, and sufficient to justify the conclusion that it was in an unsafe and dangerous condition for use. The evidence also tended to show that the condition stated had existed for a sufficient time to charge defendant with notice. This made a case of negligence for which defendant is liable. Numerous authorities sustaining this view of the case may be found cited in [Elam v. City (Ky.)] 20 L.R.A.(N.S.), 656.

The further contention of defendant that the evidence fails to show that plaintiff fell upon the walk in consequence of the conditions stated is not sustained. That was a fair question for the jury. The question of contributory negligence or assumption of risk was not presented on the trial below, and for that reason neither question is properly before us. If either question was litigated and considered in the case, a request to submit them to the jury should have been made. Ellington v. Great Northern Ry. Co. 92 Minn. 470, 100 N. W. 218. The notice to the city of the time and place of the accident was sufficiently specific and answered every purpose of the law. Kandelin v. City of Ely, 110 Minn. 55, 124 N. W. 449.

Order affirmed.

JOHN JACOBSON v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 20, 1912.

Nos. 17,723—(69).

Object of rules of practice.

Rules of pleading and practice are mere means to an end, and do not

[1] Reported in 139 N. W. 142.

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themselves constitute the end sought to be obtained by a judicial determination, their purpose in all cases being to facilitate and insure the administration of justice; and in no case should they, by blind and unreasoning application, be allowed to defeat the very purpose for which they were adopted.

Concurrent causes of accident — failure of proof — dismissal.

Where the complaint, in an action by a servant against the master for injuries alleged to have been caused by the negligence of the latter, charged that the defendant furnished the plaintiff with two defective or insufficient instrumentalities with which to work, and the proof failed as to one, but the evidence as to the other was sufficient to make an issue for the jury, the fact that both of the acts of negligence so charged were alleged to have been the concurrent causes of the accident did not necessarily require a dismissal of the action, and, it appearing that the defendant was not prejudiced thereby, did not constitute ground for setting aside the verdict of the jury in favor of the plaintiff. R. L. 1905, § 4161.

Questions for jury.

Evidence in an action by a night coal chute tender for injuries alleged to have been caused by his employer's failure to supply his lantern with the proper kind of oil, thus causing it to be suddenly extinguished while the plaintiff was climbing a ladder attached to the chute, whereby he was caused to fall, considered, and *held* sufficient to take the case to the jury, both upon the issue of negligence and upon that of proximate cause.

Charge to jury.

Instruction in such action considered, and *held* not to constitute reversible error, in that it failed to state the constituent elements of actionable negligence.

Action in the district court for Clay county to recover $5,000 for personal injuries. The material allegations of the complaint are summarized in the second paragraph of the opinion. The answer alleged negligence on the part of plaintiff. The case was tried before Taylor, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for $1,500 in favor of plaintiff. From an order denying defendant's alternative motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

J. D. Sullivan and *M. L. Countryman,* for appellant.

Christian G. Dosland, for respondent.

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PHILIP E. BROWN, J.

Appeal by the defendant from an order denying its motion for a judgment notwithstanding the verdict or for a new trial, made after a verdict for the plaintiff, in an action to recover damages alleged to have been caused by the defendant's negligence.

The complaint, after setting out the usual formal parts, charged that the plaintiff was employed by the defendant in the loading of coal out of a coal shed in Barnesville, and that to perform such work it was necessary for him to go into the upper part of the shed, which was about 35 feet above the ground and accessible only by means of a ladder provided by the defendant for that purpose; that the plaintiff, pursuant to his duty, on the evening of February 23, 1910, attempted to ascend the ladder; that the defendant neglected to furnish the plaintiff a safe place in which to work, and likewise failed to furnish him with safe appliances, tools, and instrumentalities, in that the ladder was not provided with guards or railings, and that the defendant negligently permitted the rounds or rungs of the ladder to become and remain loose and in a state of disrepair, and furthermore neglected to provide adequate or suitable means of lighting the ladder or surrounding premises, the only means provided by the defendant for lighting the ladder and shed being a lantern fitted with wick and burner suitable for the burning of signal oil, and unfitted for the burning of other kinds of illuminating oils, and negligently failed to furnish signal oil, but provided kerosene for use in the lantern, the unfitness of which for use in such lantern being known to the defendant, but unknown to the plaintiff; that on the evening of the day aforesaid, while the plaintiff, provided with no means of lighting his way up the ladder, other than the lantern above described, was about 32 feet above the ground, the light suddenly went out because of the unsuitableness of the oil, and "that by reason of the darkness caused by the sudden extinguishing of said light, as well as the faulty and dangerous construction of said ladder, and by reason of said ladder being in a state of disrepair as hereinbefore specified, plaintiff * * * lost his balance upon said ladder and was thereby precipitated to the ground; that plaintiff, by reason of all

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of the facts set forth, received great and permanent bodily injuries," to his damage in a stated sum.

The only claim of negligence which the court submitted to the jury concerned the failure of the defendant to furnish proper lantern oil; it being held that such was the only actionable negligence proper to be submitted.

1. The appellant's first contention relates to a matter of pleading, and the claim made is that, having, in the portions of the complaint which we have quoted, alleged that the injury occurred, not from two several and distinct acts of negligence, but from two acts or omissions taken together, the plaintiff's failure to prove both of the charges—that is, the insufficiency and defective condition of the ladder as well as the neglect to provide proper oil—constituted a failure of proof. The defendant, arguing from the premises stated, claims that the court erred in refusing to dismiss the action.

We do not find in the record that the attention of the court below was called to this contention on the trial, and the trial, it seems, proceeded in the same manner as if the complaint had been in the usual form. There is moreover no suggestion that the defendant was in any way misled in its defense to both of the charges of negligence, taken either separately or together, and it offered evidence to meet both charges. Furthermore, the court expressly stated and warned counsel that the charge of negligence based upon the condition of the ladder would not be submitted to the jury, and the defendant made no objection, either at such time, or when the case was submitted upon the sole issue of negligence in furnishing improper oil.

It may be a rule of pleading that where the complaint, in a single count, contains several averments, all of which, combined together, make up the one cause of action alleged, it is necessary to prove each of the several averments in order to sustain the cause of action as laid. See Birmingham Co. v. Baylor, 101 Ala. 488, 493, 13 South. 793; Wormsdorf v. Detroit, 75 Mich. 472, 42 N. W. 1000, 13 Am. St. 453; Ratteree v. Galveston, 36 Tex. Civ. App. 197, 81 S. W. 566; 6 Thompson, Negligence, § 7474. But we have no occasion here, we think, to consider whether such is the rule or not, nor to determine

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the kindred question whether, if such be the rule, the complaint in the instant case comes within it.

Rules of pleading and practice are mere means to an end, and do not themselves constitute the end sought to be attained by a judicial determination. They are only methods of operation, or they might be said to be the grooves in which the wheels of the judicial machinery ordinarily run. In all cases their purpose is to facilitate and insure the administration of justice, and in no case should they, by blind and unreasoning application, be allowed to defeat the very purpose for which they were adopted, or even unreasonably or uselessly to delay the determination of the case. Where, therefore, the reason of such a rule fails, it is familiar law that the rule itself ceases to apply. With this conception of the rule invoked by the defendant in mind, let us again consider the defendant's contention.

It is not claimed that the complaint is defective in charging the defendant with negligence in the furnishing of improper oil, but only that it was established on the trial that the ladder had no defects. The question then is: Where a complaint in an action for negligence alleges that the master furnished to his servant two defective or insufficient instrumentalities with which to work, and the proof fails as to one, but the evidence as to the other is sufficient to make an issue for the jury, should the plaintiff be nonsuited on account of his failure to prove both, merely because he has alleged both as concurrent causes of the accident? The only result of such a dismissal would be to bring about a new trial of the action upon an amended complaint, eliminating the cause of action which was not proved, or which, perhaps, was not provable; and to apply such a rule after verdict would be sacrificing substance to form, at least where it appears that no prejudice has resulted.

Our statute (R. L. 1905, § 4161) provides: "In every stage of an action, the court shall disregard all errors or defects in the pleadings and proceedings which do not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason thereof." Applying this statute to the point under consideration, we must rule against the defendant's contention.

2. On the merits, the defendant contends that the plaintiff failed

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to establish negligence in the furnishing of kerosene oil for the lantern, and, further, that if such contention be determined against it, then such negligence was not the proximate cause of the injury, and that there should at least have been a new trial; and in considering these questions we must assume the truth of the defendant's claim, above stated, that there were no defects in the ladder. Upon the record before us it must be admitted that the plaintiff's version of the accident is somewhat confused and contains some contradictions. This, however, is neither remarkable nor necessarily significant, when we consider the length to which the plaintiff was interrogated, and from his evidence, taken as a whole, a fairly clear and consistent account of the matter may readily be gathered. Among other things, we find in the record a written statement, made by the plaintiff on March 25, 1910, narrating the occurrences which preceded his injury. This statement was received in evidence, and the jury were, we think, warranted in believing it. It is substantially as follows: On February 18, 1910, the plaintiff was given the position of night coal chute man for the defendant at Barnesville, and worked in that capacity until February 23, 1910, when he was injured. In order to perform his duties he had to climb a ladder 36 feet long, which was attached almost perpendicularly to the side of the coal shed. About 9 o'clock, on the night stated, which was very dark, the plaintiff, in the performance of his duties, undertook to ascend the ladder. The coal chute was unlighted, and he carried with him a signal oil lantern furnished him by the defendant, which, however, was filled with kerosene, instead of signal oil. As to what happened thereafter, we quote from the plaintiff's statement: "When I was within about 6 feet of the top of the ladder, my lantern caught on one of the braces or rungs of ladder, and went out, and I missed next brace when I grabbed for same; that is, I grabbed short, I being unable to see when lantern went out, in consequence of which I lost my balance and fell to ground below."

There was evidence tending to show, and sufficient, if believed, to warrant a finding, that kerosene was not the proper kind of oil to use in a lantern of the kind here in question, which was designed and manufactured especially for the burning of signal oil, the burner

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thereof being different from a kerosene burner, and that, if kerosene is used in such a lantern, the light is likely to be extinguished by any sudden movement, whereas such is not likely to happen when signal oil is used, of which facts the defendant was aware, but the plaintiff was not. It also appeared that the night was frosty and cold, and that the plaintiff was heavily dressed, with mittens on his hands; the lantern being carried suspended from his left arm as he ascended the ladder.

Upon the above showing, we think the jury were warranted in finding that the defendant was negligent in equipping the lantern with kerosene. We think, also, that, within the rule of Christianson v. Chicago, St. P. M. & O. Ry. Co. 67 Minn. 94, 69 N. W. 640, and the numerous cases following it (see 2 Dunnell, Minn. Dig. § 7002), the question of proximate cause was for the jury. At least, we find no occasion to disturb the verdict on either of the grounds stated, after the trial court's refusal to set the same aside.

3. The defendant's last claim is that the court erred in instructing the jury as follows: "If, after considering all of the evidence in the case, you are satisfied that this lantern was more easily extinguished when burning kerosene than when burning signal oil, and that it would not have been extinguished at the time of the accident, had it been burning signal oil instead of kerosene, and are further satisfied that the extinguishing of the lantern caused the plaintiff to lose his hold upon the ladder and fall, these are facts from which you can find that the accident resulted from the negligence of the defendant." The criticism of this instruction is that it directs the jury as to what, as a matter of law, would constitute negligence under any particular given circumstances. But, assuming this criticism to be well founded, the instruction was equally vulnerable thereto at the time it was given, and yet no objection was made at such time. The instruction is faulty, in that it fails to state the constituent elements of actionable negligence; but the jury were elsewhere in the instructions plainly told that the plaintiff could not recover unless the defendant was negligent, and that portion complained of would seem to have been directed more to the issue of proximate cause than to that of negligence. The defect complained of, therefore, was clearly due to a

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mere oversight on the part of the trial court, which evidently also escaped the notice of the defendant's counsel on the trial, and, for the reasons stated in subdivision 1 of this opinion, we cannot hold, under the circumstances, that it constitutes reversible error.

Order affirmed.

E. L. CARPENTER v. UNITED STATES EXPRESS COMPANY.[1]

December 20, 1912.

Nos. 17,732—(81).

Carrier — contract in New York — case followed.

Plaintiff, by an agent, gave to defendant, an express company, valuable furs in wrapped packages for shipment from New York to Minneapolis, and accepted a shipment receipt therefor wherein it was stipulated that in case of loss the value did not exceed $50. Adhering to the rule in Porteous v. Adams Express Co. 115 Minn. 281, the shipping receipt became, under the decisions of New York, a valid contract in all its terms.

Findings sustained by evidence.

Held, also, that the finding that the shipping receipt is a contract entered into fairly, and is just and reasonable, is supported by the evidence.

Foreign contract enforceable.

A contract, valid in the state where made, will be enforced by the courts of this state, when not contravening the public policy of the state, or its laws.

What law governs.

Upon the facts herein plaintiff is not in a position to raise the question whether a contract of interstate carriage should be construed in accordance with the laws of the state where the breach occurred, rather than in accordance with the laws of the state where made.

[1] Reported in 139 N. W. 154.

Note.—For conflict of laws as to carriers' contracts, see note in 63 L.R.A. 513. As to validity of stipulation limiting carrier's liability to agreed valuation as affected by the Hepburn act, see note in 28 L.R.A.(N.S.) 293.

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Findings sustained by evidence.

The finding to the effect that defendant had legal rates graduated in accordance with the value of the shipment, so that it was lower when the value of the shipment was limited to $50 or less, and correspondingly higher when valued in excess of said sum, is sustained by the evidence, so that no special consideration need be shown for the limited liability, other than the lower rates in force for shipments made thereunder.

Limiting liability — Federal statute.

The Carmack amendment of the Hepburn act does not prevent a common carrier from making valid shipping contracts limiting liability according to an agreed value upon interstate shipments under legal tariff rates.

Action in the district court for Hennepin county to recover $400, value of property lost while in possession of defendant carrier. The answer alleged that the shipment was under a certain contract embodied in the receipt given to and accepted by the shipper; that one of the conditions of such contract was that "the liability of this company is limited to $50, unless a greater value is stated in this receipt, and ceases on delivery of property at the nearest point of destination it can carry same." The reply admitted that defendant gave the representative of the hotel a paper, referred to in the answer as a receipt or contract, but denied that said pretended receipt or contract was ever accepted by plaintiff, or by any one for him, or in his behalf, as such, or that such pretended receipt or contract was ever delivered or accepted or intended, by any one representing plaintiff, for the purpose of creating a contract, but was delivered solely as a receipt for money paid for the express charges. It further alleged that plaintiff was never requested by defendant to state the value of the articles specified in the complaint, nor was any such request ever made of any person representing plaintiff, and that defendant was advised of the character of the goods so accepted for shipment. It further alleged that the rate charged was an arbitrary rate, and was not a rate intended to be based on any special agreement relative to the value of the articles.

The case was tried before Booth, J., who made findings of fact and as conclusion of law ordered judgment in favor of plaintiff for $50 and interest thereon. Plaintiff's motion for a new trial was denied.

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From the judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Powell & Simpson and *Ernest C. Carman,* for appellant.

Frank B. Kellogg, C. A. Severance and *Robert E. Olds,* for respondent.

HOLT, J.

The judgment appealed from was entered upon findings of fact after trial to the court, and involves the right of plaintiff to recover from the defendant, an express company, for goods lost in transit, any more than the limited amount stated in the shipping receipt issued by defendant when the goods were delivered to it.

Plaintiff resides in Minneapolis, Minnesota, and on February 20, 1907, while stopping at a hotel in New York City, gave valuable furs done up in paper boxes to a valet in the hotel, with instructions to send by express to Minneapolis. The valet took the boxes to a porter in the hotel who attends to such matters, and the porter prepared the boxes for shipment by placing heavier wrappers around them. It was customary for an agent of defendant to call at the hotel for articles which guests might desire to send over its routes. The porter turned over these boxes, and $2 to pay expressage thereon, to defendant's agent, who, in return, issued a shipping receipt, which purported to limit the recovery in case of loss to $50. The trial court found that this shipping receipt became the contract between the parties in regard to the shipment, that it was fairly entered into, that it was valid under the laws of the state of New York, where made, and contravened neither the public policy nor law of this state nor any act of Congress, that the rate charged was fair for the limited liability assumed, and that the limitation of liability in the receipt was just and reasonable in the eye of the law. Plaintiff appeals, because the recovery was limited to the $50. He insists that he is entitled to $400, the full value of the furs lost.

One contention is that, since the evidence in the case consists of admissions, documents, and depositions, this court is in as good position to determine the ultimate facts as was the trial court, and therefore the rule that the findings of the trial court on issues of fact will

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stand, unless manifestly without support in the evidence, does not here apply. This is not so. The duty to determine the issues of fact is by law laid upon the trial court, where there is no jury; and the appellate court may not interfere therewith, save to ascertain whether the record presents evidence which fairly sustains the findings. Treat v. Kellogg, 104 Minn. 54, 115 N. W. 947; Wunder v. Turner, supra, page 13, 138 N. W. 770, and cases therein cited.

Under the findings of the court, the contract of shipment, if made in this state, would have been valid as to the limitation of value, under the doctrine announced in Alair v. Northern Pac. Ry. Co. 53 Minn. 160, 54 N. W. 1072, 19 L.R.A. 764, 39 Am. St. 588, and ever since recognized. And we think the findings cannot be successfully attacked on appeal. But, even if it were conceded that the findings are wrong, the undisputed facts herein bring this case squarely within that of Porteous v. Adams Express Co. 115 Minn. 281, 132 N. W. 296, so that the law, as it exists in New York, where the shipment was made, governs, and thereunder a shipper, who receives a receipt similar to the one here in question, without objection, is, in the absence of fraud, concluded by its terms.

A contract valid in the state where made will be enforced by the courts here, if it does not conflict with the public policy or laws of our state.

Plaintiff earnestly insists that, on grounds not presented or considered in the Porteous case, the limitation is invalid, or not binding:

First, because, this being an interstate shipment, the law of the state where the loss occurs determines the validity of the limitation in the shipping receipt, and not that of the place where the contract is made. The weight of authority is against the proposition. 9 Cyc. 682, states: "A contract of carriage of goods from one country to another is governed by the laws of the country where it is made"—citing numerous cases. And although not expressly presented in the Porteous case, supra, it was held that the law of New York, where the shipment was made, determined the validity of the contract. But, even if we were to follow the doctrine that the terms of the contract "should be construed in accordance with the law of the state where its negligent breach causing injury occurs," as held in Hughes v. Penn-

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sylvania, 202 Pa. St. 222, 51 Atl. 990, 63 L.R.A. 513, 97 Am. St. 713, and also by the New Hampshire and Ohio courts in Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Pittsburgh v. Sheppard, 56 Oh. St. 68, 46 N. E. 61, 60 Am. St. 732, it does not avail plaintiff; for the evidence fails to show where the loss occurred. The limitation of value was valid where the contract was made, and, under the findings, valid here, where the goods were to be delivered.

Second. It is said there was no special consideration for this limited liability. The rule in Missouri and some other states is that there must be a special consideration to support a contract limiting liability. George v. Chicago, 214 Mo. 551, 113 S. W. 1099, 127 Am. St. 690. But in none of the adjudicated cases in this court upon this subject has it been suggested that a consideration apart from the usual rates for the estimated value of the shipment is necessary to obtain a binding limitation of value. In addition to the Alair and Porteous cases, supra, may be cited J. J. Douglas Co. v. Minnesota Transfer Ry. Co. 62 Minn. 288, 64 N. W. 899, 30 L.R.A. 860; O'Malley v. Great Northern Ry. Co. 86 Minn. 380, 90 N. W. 974; Harrington v. Wabash R. Co. 108 Minn. 257, 122 N. W. 14, 23 L.R.A.(N.S.) 745. We have, however, high authority for the proposition that no consideration, apart from the one stated in the bill of lading, is necessary to support this feature of the contract. Cau v. Texas & Pac. Ry. Co. 194 U. S. 427, 24 Sup. Ct. 663, 48 L. ed. 1053.

In this connection it is urged that, when the shipment in question was made, the only legal tariff rate in force was one for unlimited liability. To this we cannot assent, for the trial court found that the defendant had lawfully in force, not only the rate which was actually charged plaintiff, applicable to packages at not more than $50, with a limitation liability to a similar sum in case of loss, but also had lawfully in force a higher transportation rate, applicable to shipments exceeding $50 in value. In other words, defendant had in force and effect legal rates graduated according to the value of the shipment. We cannot say that this finding is not sustained. The tariff schedules were received without objection, and although it may be difficult for the ordinary person to find the established rates from

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these, one somewhat familiar with transportation business may do it readily.

Third. The chief contention is, that the limitation attempted is annulled by the Carmack amendment of the Hepburn act (Act June 29, 1906, 34 St. 595), which reads as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

There are two lines of decisions as to the effect of the quoted statute. The courts of Arkansas, Georgia, and Texas hold that since the Carmack amendment every limitation of the common-law liability of a common carrier with respect to interstate shipments is void. Kansas City v. Carl, 91 Ark. 97, 121 S. W. 932, 134 Am. St. 56; St. Louis v. Dunn, 94 Ark. 407, 127 S. W. 464; Louisville v. Warfield, 6 Ga. App. 550, 65 S. E. 308; Southern Pacific v. Meadors (Tex. Civ. App.) 129 S. W. 170. In Missouri, two of the courts of appeal have taken the same view. Blackmer v. Mobile, 137 Mo. App. 479, 119 S. W. 1, and Holland v. Chicago, 139 Mo. App. 702, 123 S. W. 987. While the Springfield court of appeals in McElvain v. St. Louis, 151 Mo. App. 126, 131 S. W. 736, interprets the act as designed to accomplish no other purpose than to take away the right a common carrier had under the common law in most jurisdictions in this country of stipulating that its responsibility as a carrier ceased upon delivery of the shipment in good order and without unreasonable delay to a connecting carrier. Such is also the construction placed on the act in Greenwald v. Barrett, 199 N. Y. 170, 92 N. E. 218, 35 L.R.A.(N.S.) 971; Bernard v. Adams, 205 Mass. 254, 91

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N. E. 325, 28 L.R.A.(N.S.) 293, 18 An. Cas. 351; Travis v. Wells-Fargo, 79 N. J. L. 83, 74 Atl. 444; Fielder v. Adams Express Co. 69 W. Va. 138, 71 S. E. 99 (April 11, 1911), and Larsen v. Oregon, 38 Utah, 130, 110 Pac. 983.

It seems to us that the evident purpose and aim of the Carmack amendment was to fix the entire responsibility upon the carrier who first accepts an interstate shipment, which must necessarily pass over the lines of different carriers in the course of its destination, so that the shipper, in case of damage or loss, will not be compelled to be to the inconvenience and expense of passing over the route to pick out and seek redress from the carrier who occasioned the injury. In other words, it imposed on the initial carrier the burden of being the principal, making the connecting carriers its agents, for whose conduct it is held responsible, and that such is the whole extent of the burden or duty imposed by the act. This burden the initial carrier may not escape by any contract stipulation. Since the shipment involved here was interstate, the contract and the rights of the parties thereunder are controlled by the Federal law, and not by the law of New York, if there be a conflict. And although the New York courts have construed the Federal act in question as not inhibiting provisions in a bill of lading or shipping receipt limiting liability, we are not bound to adopt such construction, if we conclude that the one adopted by the courts of the southern states above mentioned is right. Southern v. Harrison, 119 Ala. 539, 24 South. 552, 43 L.R.A. 385, 72 Am. St. 936. However, we are of opinion that considering the aim and purpose of the Carmack amendment, the decisions in New York, Massachusetts, New Jersey, West Virginia, and Utah take the proper view of the scope and effect of the law, and this we may do in the absence of any utterance of the Supreme Court of the United States upon the subject.

The Federal court of appeals for the Eighth circuit in the case of Latta v. Chicago, St. Paul, M. & O. Ry. Co. 172 Fed. 850, 97 C. C. A. 198, holds that by the proviso contained in the act Congress left to each state wherein the contract was made, or perhaps to the courts, to determine the propriety of permitting, prohibiting, or sustaining limitations of liability in interstate shipping contracts. It

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may also be said that inferentially the Federal Supreme Court has indicated that the interpretation placed on the act by the New York court is correct, for in Atlantic Coast L. R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, the court, speaking of this amendment, says: "It must be conceded that the effect of the act in respect of carriers receiving packages in one state for a point in another and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line." We read the opinion of Commissioner Lane in the Matter of Released Rates, 13 I. C. C. R. 550, as pointing to a different construction of the Carmack amendment from that contended for by plaintiff.

We therefore conclude that, this being a New York contract, which, under the decisions of that state, is binding in all its terms on plaintiff, and is not in conflict with the public policy or law of this state, nor with the Federal statute above quoted, no other result could be reached on the undisputed facts than was done in this case.

Order affirmed.

D. D. RUSSELL v. GEORGE E. O'CONNOR.[1]

December 20, 1912.

Nos. 17,747—(85).

Agreement to procure insurance.

Instruction given by a property owner to an insurance agent to "write out a thousand dollars insurance" on a certain building, and the agent's acceptance thereof by saying that he would "attend to that right away," *held*, under the facts of the case and in view of the prior course of dealing between the parties, to create a contract whereby the agent undertook to use reasonable diligence to procure the insurance and seasonably to notify the plaintiff in the event of the failure of such attempt, though, by reason of the condition and status of the building, the agent had no authority to write the insurance at the time of the conversation.

[1] Reported in 139 N. W. 148.

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Question of breach for jury.

Evidence in an action for the breach of such contract considered, and *held* sufficient to take the case to the jury upon the question as to whether the defendant fulfilled the obligations imposed upon him by the said agreement.

Uncontradicted evidence.

The fact that the defendant's evidence, in such action, tending to show that he fulfilled his obligations under the contract, was uncontradicted by other evidence, did not require either the court or the jury to accept the defendant's contention in such regard as established, where such evidence was itself contradictory, and the defendant also failed to produce other evidence at his command to sustain his claim.

Prejudicial error in charge to jury.

Instruction in such action *held* to constitute error prejudicial to the defendant, in that it was calculated to lead the jury to believe that the defendant could be held liable on the theory that he had authority to write the insurance at once and failed so to do, or that his liability depended upon whether a policy written by him at such time would have bound his principal, the insurance company.

Action in the district court for Itasca county to recover $1,000 for breach of an agreement to place fire insurance upon a certain building. The answer was in effect a general denial. The case was tried before Stanton, J., and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Reversed and new trial granted.

C. C. McCarthy, for appellant.

Spear & Stone, for respondent.

Philip E. Brown, J.

Action to recover damages, in the sum of $1,000, for the breach of a contract to obtain insurance on the plaintiff's building. The plaintiff had a verdict, and the defendant appealed from an order refusing to grant him a judgment notwithstanding the verdict or a new trial.

The complaint is to the effect that the defendant was, at all times here material, a fire insurance agent, engaged in such business at Co-

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leraine, and representing several fire insurance companies, the names and number thereof being unknown to the plaintiff, and, further, that on October 18, 1909, the plaintiff, being the owner of a building situate on lots 22 and 23, in block 2, of Bovey, of the value of $2,500, entered into an agreement with the defendant wherein, in consideration of the plaintiff's promise to pay the premiums, the defendant agreed to insure forthwith this building against loss by fire in the sum of $1,000 in one or more of the companies represented by him as agent, and to deliver the policies to the plaintiff, all of which he failed and neglected to do, whereby the plaintiff was damaged in the sum of $1,000 when his building was destroyed by fire on October 25, 1909. The answer admitted that during the time stated the defendant was engaged in business as a fire insurance agent at Coleraine, and placed in issue all other averments of the complaint.

The uncontroverted evidence established the plaintiff's ownership of the building, the failure of the defendant to cause it to be insured, the destruction thereof by fire on October 25, 1909, and that its value exceeded $1,000. The evidence also established the following facts: On the dates mentioned the plaintiff's building, and also certain other adjacent buildings which constituted exposures, were unfinished, and the plaintiff's building contained inflammable materials, and constituted a risk known in insurance parlance as a "special hazard;" that the building had not been rated for insurance, and that the defendant was without authority to write insurance thereon in any of the companies represented by him until the rate had been fixed by the directing officers or agents of such companies, after which, upon notice thereof, he could have written what is known as a "builder's risk" upon the building. All of these facts were known to the defendant at all times mentioned. It furthermore conclusively appeared that the defendant was a resident of Coleraine, and cashier of the First National Bank of Coleraine. This village is connected by telephone with Bovey, about a quarter of a mile distant, where the plaintiff lived. The defendant did an insurance business in both places. Prior to October, 1909, the defendant had written four insurance policies, each for the term of one year, on properties of the plaintiff in Bovey or Coleraine, without the plaintiff's designation

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of the companies which were to carry the same, and these policies had been delivered to the plaintiff without his paying the premiums in cash, a bill being thereafter rendered therefor.

In addition to the foregoing, there was evidence from which the jury might well have found, notwithstanding the defendant's denials in this regard, that the plaintiff's wife, pursuant to his instructions, on October 18, 1909, telephoned the defendant at Coleraine that the plaintiff had gone away early that morning, and wanted her to advise the defendant "to write out a thousand dollars insurance on that building we had in Bovey, lots 22 and 23, on block 2," and that the defendant replied, "Thank you, Mrs. Russell; I will attend to that right away;" and that subsequently no communication occurred between the parties until after the fire. It appeared from the defendant's own testimony that, at the time he had conversation with Mrs. Russell, he knew what building was referred to by her, that it was new and unfinished, and constituted a "hazardous risk," upon which a rating would have to be obtained from agents either at St. Paul or Duluth before it could be insured, and that such insurance could issue for only one year.

1. The first question is whether the telephone conversation between the defendant and the plaintiff's wife created a contract, and, if so, what was its nature and legal effect? The defendant contends that this conversation created no contract whatever, and placed him under no legal obligation to the plaintiff, for the reason, among others, that the plaintiff's building was not insurable as contemplated by him, or as requested by him, the same being unfinished, unrated, and a "special hazard," on which the defendant was not authorized to write insurance in any of his companies. If this conversation occurred, which, as we have held, was a question for the jury, we have no doubt that a contract was created. There was evidence tending to show that the defendant represented a number of companies, and had previously written several policies for the plaintiff on other properties, as before stated, himself selecting the companies and delivering the policies previously to the payment of the premiums, which were subsequently paid by the plaintiff on demand. The defendant's claim that no contract resulted, based on the contention that the failure to

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agree upon the premium prevented a meeting of minds sufficient to contract, is untenable. The relation between the parties arising from the conversation created an implied obligation on the plaintiff's part to pay the premium, if the policy had been written. Campbell v. American, 73 Wis. 100, 109, 40 N. W. 661. Beyond question, in such event, the plaintiff could have been compelled by action to pay the premium.

The further objections urged by the defendant in this regard, based upon the condition and status of the building, and others of the same character, are immaterial upon the question of the existence of the contract; for he has confused the question of his power to make the contract which actually resulted from the conversation with his authority actually and forthwith to write a policy under the then existing conditions. The matters thus urged as objections to the existence of the contract really go to the nature thereof, which we will next consider; and this distinction must be kept in mind to avoid confusion concerning the rights and duties of the parties. The controlling question is not whether the defendant had the right, by reason of any authority from his companies, to insure the property or to bind such companies, but whether, with knowledge of the condition and status of the property and surrounding circumstances, he bound himself to procure insurance for the plaintiff. It could not be seriously claimed that he had no authority to bind himself to fulfil the obligation which the law superimposed as the result of the conversation between himself and the plaintiff's wife. Rainer v. Schulte, 133 Wis. 130, 133, 113 N. W. 396.

The next question, then, is: What duty did the defendant owe to the plaintiff under the contract so made? At the outset we will say, without further comment, that it did not require him to violate his instructions from the companies he represented. The relation created, however, constituted the defendant an insurance broker, and as such he undertook to use reasonable diligence to get the property insured; that is, upon the facts of this case, he undertook to have the property rated and to take all other steps necessary to authorize him to write the policy, and in the event of his being unable to protect the plaintiff's property by insurance, then seasonably to notify

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the plaintiff of his inability so to do, which time, however, did not begin to run until he had had a reasonable time in which to ascertain, by the exercise of ordinary diligence, whether he could place the insurance. Backus v. Ames, 79 Minn. 145, 81 N. W. 766; Everett v. O'Leary, 90 Minn. 154, 95 N. W. 901; Campbell v. American, supra; Rainer v. Schulte, supra; 16 Am. & Eng. Enc. (2d ed.) 970; 22 Cyc. 1427.

2. Applying this rule to the facts of this case, we think it was a question for the jury whether the defendant fulfilled his obligations to the plaintiff, both as to the exercise of reasonable diligence to get the property insured, and as to notifying the plaintiff of his inability so to do, notwithstanding the defendant's claim that the evidence conclusively so established. See Rainer v. Schulte, supra. This case involved facts strikingly similar to those of the case at bar. The instant case is, indeed, much stronger in the plaintiff's favor, and yet in that case the question of the defendant's performance of his obligations to the plaintiff was held to be for the jury. Said the court at page 133[1] [133 Wis.] after adverting to the defendant's agreement to procure insurance on the defendant's building forthwith: "If such was in fact the agreement made, then it was immaterial whether the defendant at the time had authority to represent and bind some unnamed insurance company or some insurance agent. * * * The defendant certainly had authority to bind himself to procure such insurance. The evidence tending to prove that the defendant made such contract was sufficient to take the case to the jury. According to such evidence the insurance was to be procured 'forthwith.' Of course, the defendant was entitled to a reasonable time within which to procure the same. The plaintiff's claim was that the contract was made October 18, 1904, and that the fire occurred on the morning of October 20, 1904. We have had some doubt whether it ought not to be said, as a matter of law, under the circumstances disclosed in the evidence, that such delay in procuring such insurance was not unreasonable. But the question whether such delay was reasonable or unreasonable was one of fact, and it was fully and fairly submitted to the jury by the trial court. The court refused to set aside the verdict, and we cannot say that it is not sustained by the evidence."

[1] 113 N. W. 397.

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Without either approving or disapproving this case, we call attention to this fact that in the instant case the delay was considerably longer than in the case above referred to, and there must have been frequent mail service between Coleraine and Duluth. We do not think, therefore, that it was error to submit this phase of the case to the jury.

In addition to the facts already recited, the defendant claims that, on the same day he had the conversation with the plaintiff's wife, he wrote from Coleraine to the rating agents of the companies he represented, at Duluth, for a rating on the plaintiff's building, and that he received no response to his communication until after the fire, which communication and the answer thereto were in writing; the latter giving a rating on the building. It appeared in this connection that it was the custom of rating agents, when a rate was established on a building, to send the same, not only to the agent who asked for it, but also to other insurance agents in the vicinity of the risk. The defendant testified in his own behalf, but failed to produce either his communication to the rating agents or their response thereto. None of the other agents, though several were witnesses, testified to the receipt of the rating, or that none such was received. It furthermore appeared that subsequently to a written demand made by the plaintiff for the payment of the amount of this insurance the defendant, on December 12, 1910, advised the plaintiff in writing that he, the plaintiff, had made no application previously to the fire for any insurance on the building destroyed; and on February 18, 1911, the defendant made the same claim in response to a letter from the plaintiff's attorneys, and further stated that the plaintiff had asked the defendant to place insurance on the building erected after the fire. But, notwithstanding these letters, the defendant admitted on the trial that he did have a conversation with the plaintiff's wife, at the time claimed by her, concerning the insuring of the building. In view of the contradictory character of the defendant's evidence, neither the court nor the jury were bound to believe it, and therefore were not bound to accept the defendant's contention as to his efforts to obtain a rating on the plaintiff's building, though it was uncontradicted. Lang v. Ferrant, 55 Minn. 41., 57 N. W. 140; Ken-

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nedy v. McQuaid, 56 Minn. 450, 58 N. W. 35. And likewise the jury had the right to consider the defendant's failure to produce the writings claimed to have been received by him concerning the rating of this building, and the presumption arising from such failure, under the rule announced in Fonda v. St. Paul City Ry. Co. 71 Minn. 438, 452, 74 N. W. 166, 70 Am. St. 341. See also Tegels v. Great Northern Ry. Co. supra, page 31, 138 N. W. 945.

3. The trial court, in the last paragraph of the charge, instructed the jury as follows:

"Counsel has called my attention to a portion of the charge which I have given you, and his recollection of the charge differs from my own recollection, and differs from my intention; so I think I will again refer to that portion of the charge. I intended to say to you, and I think I did say to you, that the evidence shows that there had been no rate placed on this building, and that from all the evidence in the case it would be for you to determine whether the defendant could, under his authority as agent for any of these fire insurance companies, write insurance upon that building so that it would be effective without a rate having been made upon it. I say, it will be for you to determine from the testimony whether he could have written the insurance without its first having been rated."

This instruction was excepted to by the defendant, and constituted reversible error. It did not present the true issue, in that the jury were told, in effect, that the defendant's liability depended upon the contingency of whether, had he written the insurance, his company would have been bound thereby, and also that his liability to respond in damages in this action depended upon his authority to write the insurance upon an unrated risk. The instruction was erroneous in both of its branches, and is out of line with the substantive principles upon which, as above announced, the rights of the parties depend, thus confusing the issues to such an extent that we cannot say that the jury was not misled thereby. It is impossible to determine how the jury arrived at their verdict. Under this instruction they might have concluded that the defendant should have been held liable because of his failure to write the insurance on the ground that he had

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authority to do so, or that his liability depended on whether a policy written by him would have bound his principals, neither of which theories would sustain a verdict.

4. In view of the fact that the case must go back for another trial, we will refer to some of the alleged errors in the admission of evidence. The defendant's objections that the conversation between the plaintiff and his wife, in which he authorized her to apply to the defendant for insurance, constituted hearsay, were properly overruled. The authority of the defendant, concerning all matters relating to insurance, must be established with reference to his contract with his principals, and according to his actual and implied authority under the law of agency, and not by the opinions of alleged experts as to what he had the right to do as an insurance agent.

Order reversed, and new trial granted.

JOHN PYLACZINSKI v. GREAT NORTHERN RAILWAY COMPANY.[1]

December 20, 1912.

Nos. 17,774—(116).

Railway hazard — question for jury.

Whether plaintiff, at the time of the accident, was engaged in work exposing him to a hazard incident to the operation of a railroad was, on the evidence in this case, a question of fact for the jury, and the verdict is not so against the weight of evidence that it was an abuse of discretion to refuse to set it aside.

Same — case followed.

Janssen v. Great Northern Ry. Co. 109 Minn. 285, holding the order by the foreman in charge for expeditious work, and the fact that the order is complied with, create a hazard incident to the operation of railroads, and not the necessity in fact for such haste, followed and applied.

Questions for jury.

Whether plaintiff was guilty of contributory negligence, and whether he assumed the risk, were questions for the jury, and the verdict is sustained by the evidence on these points.

[1] Reported in 139 N. W. 147.

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New trial.

It was not error to deny a new trial because of affidavits tending to show that an interpreter who acted on the trial was interested in the case.

Verdict not excessive.

The damages were not excessive.

Action in the municipal court of Minneapolis to recover $500 for personal injuries. The complaint alleged that the work in question was necessarily done in haste in order to avoid trains that were or might be passing on the main track where the push car stood, and that the haste in doing the work was caused by the order of the foreman, and that such haste was a contributing cause to the accident, and the workmen were not then engaged in the construction of a new road. The answer alleged negligence on the part of plaintiff and that he was a man mature in years and had had long experience as a section man and in doing the work in which he was engaged when injured; that he was perfectly familiar with the method of doing the work and knew all the dangers and hazards incident thereto. The case was tried before Montgomery, J., and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Cobb, Wheelwright & Dille and *H. C. Mackall,* for appellant.

Norton & Norton, for respondent.

Bunn, J.

This is an action to recover damages for personal injuries sustained by plaintiff while employed as a section hand by defendant in its yards in Minneapolis. Plaintiff had a verdict for $500, and defendant appeals to this court from an order denying its blended motion for judgment notwithstanding the verdict or for a new trial.

Plaintiff, at the time of his injury, with three other employees of defendant, was loading ties on a push car on a main track of defendant's line. The pile of ties was some distance from the car, across two intervening tracks. It was the custom for the four men, as they approached the car with a tie, to stop, wait for a signal, and then

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throw the tie on the car, all the men throwing at once. After the car had been partly loaded, the men were bringing another tie, and, as they approached the car, plaintiff and one of the men were carrying one end, while the two other men had the other end. The claim of plaintiff was that the men at the other end of the tie, which was nearer the car than the end that plaintiff held, without stopping and without any signal, threw their end on the car. This caused the tie to strike the pile on the car unevenly, and to fall back, crushing plaintiff's right forefinger.

The evidence was clearly sufficient to sustain a finding that the accident was caused by negligence on the part of plaintiff's fellow servants. The chief contention here is that defendant is not liable to plaintiff, because the work in which plaintiff and the other men were engaged did not involve a railroad hazard. There was evidence tending to show that, as the four men got hold of the tie preparatory to taking it to the car, the foreman in charge of the work called to them to "Get a move on you! the passenger is coming," and that the men hurried in response to this order. The evidence was such that it was for the jury to say whether there was an order from the foreman to hurry, whether the work was being done with unusual haste, and whether this haste was an essential element in causing the accident.

Defendant contends that in addition to the order, and the unusual haste in response thereto, it is an essential element in the "rule of haste" that there be an actual necessity for haste, due to trains which are or might be approaching. This contention is directly disposed of adversely to defendant in Janssen v. Great Northern Ry. Co. 109 Minn. 285, 123 N. W. 664, where it was said by Mr. Justice Brown that "the order for expeditious work by the foreman in charge, and the fact that it is done in unusual haste, create a hazard incident to the operation of railroads, and not the necessity therefor in fact." There was no actual necessity for haste in the Janssen case, or in Tay v. Willmar & Sioux Falls Ry. Co. 100 Minn. 131, 110 N. W. 433, or in Christiansen v. Chicago, M. & St. P. Ry. Co. 107 Minn. 341, 120 N. W. 300.

In the case at bar in fact there appears to have been more reason

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for haste than in the cases cited; a passenger train being due on the track in perhaps half an hour after the order was given. We must hold, under the authority of the above cases, that the evidence was sufficient at least to justify the submission to the jury of the question whether the work involved a railroad hazard, and to warrant the verdict that it did. There was evidence contradicting the essential facts of the order and the actual haste, but we are unable to say that it was an abuse of discretion not to grant a new trial, on the ground that the verdict was not sustained by the evidence.

The claim that plaintiff was on the evidence guilty of contributory negligence as a matter of law cannot be sustained, nor can the claim that he assumed the risk. These questions were for the jury, and their decision thereon is sustained by the evidence.

It is assigned as error that a new trial was not granted, because of affidavits tending to show that an interpreter, who acted in the case, was interested in the outcome. It is not clear from the affidavits that he was so interested, and clearly no prejudice to defendant was shown. The trial court did not abuse its discretion in refusing a new trial on this ground.

The damages are not so clearly excessive that we are warranted in interfering with the verdict after it has met the approval of the trial court.

Order affirmed.

JOSEPH STRUNK v. WELLS BROTHERS COMPANY and Another.[1]

December 20, 1912.

Nos. 17,782—(121).

Verdict not sustained by evidence.

In this a personal injury action, the evidence examined, and *held* not to sustain the verdict, in that it fails to show the defendants guilty of any negligence.

[1] Reported in 138 N. W. 1030.

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Action in the district court for Ramsey county to recover $5,000 for personal injuries. The answer alleged that the building was being constructed pursuant to a contract between defendants; that the contract did not provide or permit defendant Arcade Investment Company to exercise any control whatever as to the manner or method of constructing the building, or doing the work, and that company did not at any time give any directions as to how the work should be accomplished, and that the contract was an independent one. The answer admitted that in the construction of the building a wooden scaffold was used near a roadway on the premises; that as plaintiff was hauling a load of material for use in the construction of the building he negligently struck a support of the scaffold; that it was broken by the force of the collision and some boards from the scaffold fell upon him whereby he sustained injuries; that he was familiar with the roadway, the scaffold and the premises and that his injuries were caused by his own negligence.

The case was tried before Kelly, J., who denied defendants' motion to direct a verdict in their favor, and a jury which returned a verdict in favor of plaintiff for $800. From the judgment entered pursuant to the verdict, defendants appealed. Reversed.

P. J. McLaughlin, for appellants.

John D. O'Brien and *Dillon J. O'Brien,* for respondent.

HOLT, J.

In this a personal injury action, defendants appeal from the judgment entered in favor of plaintiff; their motion for directed verdict having been denied, as well as a motion for judgment notwithstanding the verdict. The only assignment of error necessary to consider is that the evidence fails to show defendants negligent. These appear to be the facts:

The defendants are corporations. The Wells Brothers Company was erecting a large business block for the Arcade Investment Company fronting west on St. Peter street, between Fourth and Fifth streets in St. Paul, Minnesota. For about three months prior to the accident resulting in plaintiff's injury, he had been hauling crushed rock used in the concrete work of the building, hauling three or four

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loads each day. For convenience and safety a high fence had been erected inclosing the sidewalks adjacent to the building and part of the streets. On St. Peter street, near the middle of the building, there was a gate through which the teams passed in with materials for the structure, driving along and upon the sidewalk space.

It also appears that as the building arose it was necessary to protect these teams and drivers and other workmen from material which might drop down from above, and to that end a covered way was constructed by placing a row of posts close to the building and a corresponding row near the fence mentioned, and a beam or joist was spiked with one end to the post near the building and the other to the corresponding one near the fence and at a height so that, with the braces placed slanting and somewhat lower, a man standing on the load as he drove underneath would not come in contact with the joists and braces. It does not clearly appear how far each set of posts was away from the adjoining set, but from an examination of the photographs in evidence it appears to be from 15 to 20 feet. Each set was connected with the next adjoining by joists and braces. The distance between the posts nearest the building and those nearest the fence was 13 or 14 feet, except that, near the gate spoken of, the outside post was 25 feet 8 inches from the corresponding one near the building, so as to allow the turning of the teams and wagons in going upon the sidewalk. On top of the joists mentioned planks or boards were laid, covering the driveway on the sidewalk, and thus protecting the men and teams using it from falling material.

A watchman, presumably in the employ of defendant Wells Brothers Company, was stationed at the gate and directed the order in which the teams were to drive in. Plaintiff was not in the employ of either defendant, but hauled the crushed rock at so much per load for the one who furnished it to the concrete contractor.

On June 13, 1911, as plaintiff and two other teamsters approached the gate with loads of crushed rock, a team with a load of brick also drove up. The watchman directed the brick load to go in first. As the last team drove in, it turned to the right and stopped as near to the outside posts as it could, so as to allow the brick to be unloaded and piled near the fence. Concluding that there was room for the

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teams with the crushed rock to drive in to a place provided for unloading in the covered driveway beyond where the team with the brick load was to unload, the watchman directed Bieren, driving the first load of crushed rock, to drive in, and plaintiff to follow. The space was so narrow that one of the hubs on Bieren's wagon caught in the wagon with the brick load. The teamsters pried them apart, and Bieren drove on to his place of unloading. Then plaintiff, standing upon his load, attempted to pass by the brick load, driving up as far toward the building as he could, and then making a sharp turn to the right to pass inside of the brick wagon.

In so doing he either drove too far before turning, so that the wagon tongue squarely struck the post next to the building, breaking it in two, as defendants contend, or else, as plaintiff claims, after he had made the turn, and just as he was about to pass the brick wagon, one of the front wheels struck a brick or rock, and the load, being very heavy, threw the team over toward the building, so that the neck yoke or tongue struck and broke the post. When the post broke, that part of the covered way which it supported sagged so that some of the planks fell down; one striking plaintiff on his shoulder, whereby he was thrown off the load, and in the fall his leg was broken.

Along the posts spoken of as next to the building was laid on the ground a wooden box a foot high and six inches wide in which cables ran. The box was laid against the posts, and served to protect them from the teams and the hubs of the wagons as these passed along the driveway.

The allegation of negligence is as follows: "Defendants maintained * * * a wooden scaffolding [the covered driveway above described], which was by the defendants negligently and carelessly built and maintained, of insufficient and unsuitable materials, insufficiently nailed, braced, designed, and constructed, and negligently placed, built, and maintained in such position and proximity to the place of ingress and egress to and from said premises that it would be liable to be struck by persons, teams, or materials coming upon or being brought upon said premises and so weak, insufficient,

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and improperly constructed as to be liable to fall upon the application of slight force, or being struck by persons, teams, or material coming upon or being brought upon said premises."

There was no evidence or claim of any defect in the construction of this covered driveway, except that the post which broke was closer to the driveway than the others, and that it was burned to some extent, at least on one side. There is some confusion in the record as to which post broke, the first or the second, beginning with the pair immediately to the right of the gate as one passed in toward the building; but it is plain from the photographs in evidence that all of the posts next to the building were placed up against the cable box spoken of, and certainly no negligence may be predicated on this position, for it is apparent that they were fully protected from the wagons by the box, and it could not be reasonably apprehended that the drivers would drive the teams over or against the box so far as to endanger the posts on the other side by the pole or neck yoke.

There remains then, only the alleged defect in the post which broke. The evidence is fairly certain that these timbers were substantial and of ample strength for the purpose intended, being 4 inches through one way and 6 inches the other. The only defect testified to by any of plaintiff's witnesses was that this post which broke had been charred or burned. One witness, Mr. Bieren, said: "The post was a little burned around the outside, but how much I didn't measure. I didn't look particularly, but the post was burned. * * * It was pretty near burned all the way round; yes. One side of it wasn't just exactly burned, but it was kind of black; but one side of it was burned about an inch deep." This witness also testified that this post was 5 or 6 inches square. The teamster who hauled the third load of crushed rock and who saw the accident, having testified to the post being burned, when asked how much, answered: "Well, I couldn't just tell; I didn't look at it close just how much was burned; I could see it was burned around." But these witnesses testified that they had observed that this particular post stood nearer the driveway than the others, but had never noticed that it was burned before the accident.

Defendants produced, at the trial, what was claimed to be one part

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of the broken post, a sound piece of hemlock timber 4 by 6 inches, with no indication of crack, knot, or weakness at the point where it did break square off. It was somewhat scorched its whole length but not so as to affect its strength. Several of defendants' witnesses positively identified this piece as one of the two parts into which the post broke when the neck yoke or pole of plaintiff's team struck it. No attempt was made by plaintiff to dispute defendants' contention that the piece produced at the trial was the very piece that broke, either by calling in rebuttal his two witnesses who had noticed and testified to the condition of the post or by any other witness.

We have carefully scanned the record to see if there might be any basis on which the judgment can be sustained, but have failed. There certainly, as before stated, could be no negligence in the location of this post; for by the uncontroverted testimony of plaintiff's witnesses, and the concededly accurate photographs, it was protected, like the rest of the posts next to the building, by the cable box before mentioned. And it is manifest, also, from the photographs and the evidence, that this post, as well as each of the others, was of ample strength to sustain the weight it was designed to carry and any ordinary jar which might be anticipated. It is also clear that it was securely braced and anchored, both at the bottom and top, because it broke squarely off by the impact, and was not torn loose at either end.

This covered driveway was a temporary structure, to protect the workmen and teams while the building was being built, and common knowledge teaches that as to such the same care is not taken as to location or solidity of construction as is taken in case of permanent structures. It is also entirely obvious that those constructing a driveway similar to this one, or any scaffolding around a building being erected, do not anticipate that teams will be driven against them with any considerable force, because no temporary building scaffold or structure to serve the purpose of the one in question could withstand the impact of a heavy team or wagon. And the force directed against the post in this case must have been of unusual violence to have caused the break. How long this driveway had existed does not appear, although it does appear that the covering just above where

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the post broke was then being placed. The posts had, however, been in place for some time, and plaintiff was fully acquainted with the situation, and knew that it was extremely difficult to pass the brick wagon, still he undertook to drive in.

Accepting, as we must, the most favorable view of the testimony for plaintiff as to defendants' negligence, we are nevertheless forced to the conclusion that the record fails to show any, and, assuming that plaintiff was free from negligence, the deplorable accident was due to the fact, which he admits, that one of the front wheels came in contact with some obstruction, thereby unexpectedly throwing the pole or neck yoke against the post with sufficient force to break a post that as far as the evidence shows was of ample size and strength to carry all the strain which might reasonably be expected that it would be subjected to. We may assume that defendants owed plaintiff the same duty they would owe their own servants to make the driveway reasonably safe. However, they are not to be held as insurers of safety. Plaintiff knew that it was difficult to pass the brick wagon. He could observe as well as any one if obstructions were in the way. He, as well as his witnesses, his fellow teamsters, claim that they had particular occasion to notice this post, because of its location; but none had seen that it was in any manner defective or burned until after the accident. We do not think it possible, in whatever light this evidence is viewed, to hold the defendants on any ground of negligence responsible for this accident in which plaintiff was injured.

The judgment appealed from must therefore be reversed, with direction to enter judgment in favor of defendants.

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C. C. EMERSON v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.[1]

December 20, 1912.

Nos. 17,783—(112).

Duty of carrier — evidence of negligence.

A particular shipment of a car of potatoes over defendant's road imposed upon defendant the duty to inform plaintiff of the refusal of a prospective purchaser to accept the same within 48 hours. The evidence is *held* to justify the conclusion that the purchaser refused to accept the consignment, and that defendant negligently failed to notify plaintiff thereof.

Admission of opinion evidence.

The opinion of an expert of the value of a partly frozen carload of potatoes *held* properly admitted in evidence. The rule that the admission of such evidence is discretionary with the trial court followed and applied. McDonough v. Cameron, 116 Minn. 480.

Action in the district court for Ramsey county to recover $67 upon the second cause of action and $274 upon the fourth cause of action. The facts are stated in the opinion. The case was tried before Dickson, J., who directed a verdict in favor of plaintiff for $341. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

Morton Barrows and *Arthur A. Stewart,* for appellant.

Walter L. Chapin, for respondent.

Brown, J.

The complaint in this action contained four separate causes of action, only two of which, the second and fourth, survived the trial below, upon which the court directed a verdict for plaintiff. Defendant appealed from an order denying a new trial.

The short facts are as follows: In respect to the second cause of action it appears that on February 19, 1910, plaintiff delivered to defendant a carload of potatoes consigned to himself at Kansas City, Missouri, to be by defendant transported to that place. The

[1] Reported in 138 N. W. 1026.

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usual bill of lading was issued and delivered to plaintiff, which, together with the draft for the price of the potatoes drawn upon Woodson Bonded Brokerage Company, to whom the potatoes were to be sold, was transmitted to a bank at Kansas City for collection. Defendant was instructed to notify that company of the arrival of the potatoes. We understand from appellant's brief that this method of the shipment of merchandise is quite common, and that the practice is for the railroad company to notify the intending purchaser of the arrival of the car, and to notify the consignee of his failure, within 48 hours, to take and remove the property. The shipment in question reached its destination some time about February 23 or 24, and the Woodson Company was duly notified of the arrival. That company, however, failed to take up the draft, and refused to accept the shipment, of which refusal it is claimed defendant failed to notify plaintiff. The potatoes remained in the car at Kansas City until March 18, when they were sold by plaintiff at a loss.

The only question raised on this appeal is whether the evidence is sufficient to justify a finding that the Woodson Company refused to accept the potatoes, thereby imposing upon defendant the duty to so notify plaintiff. There is no dispute about any of the facts, or the rights, duties, and liabilities of the parties under the contract of the shipment. Our examination of the record discloses sufficient evidence from which the court was justified in deciding the question in plaintiff's favor. The custom, evidence of which was offered by plaintiff, required defendant to notify plaintiff of the nonacceptance of the shipment, if not taken within 48 hours. The potatoes were not taken within that time, or at all. The car remained upon defendant's side track at Kansas City until March 18, or about three weeks, and no notice of nonacceptance was given plaintiff.

The fourth cause of action involved a car of potatoes shipped over defendant's line from this state to Clarinda, Iowa. The car reached its destination in due season, and it is conceded that the potatoes were frozen and damaged because of the negligence of defendant in not properly caring for them after their arrival at Clarinda. The extent of this damage was the only question litigated below. Defendant offered no evidence upon the question. The potatoes were in sacks,

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and plaintiff's evidence tended to show that by reason of the fact that the car was left exposed in the railroad yard during severe weather, 10 degrees below zero, at least one-third of them were frozen solid. Plaintiff's witness, a dealer of long experience and familiar with the subject, was permitted as an expert to testify over defendant's objection that the entire lot of potatoes was worthless. It is contended that in this the court erred. Whether this contention is sound presents the sole question upon this branch of the case.

The admission of evidence of this character rests in the sound discretion of the trial court, in the exercise of which in the case at bar we discover no error. McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118. Plaintiff, upon finding the potatoes in the condition stated, abandoned them. What defendant did with them the record fails to disclose. Defendant offered no evidence.

Order affirmed.

CHARLES BATCHER v. CITY OF STAPLES.[1]

December 20, 1912.

Nos. 17,811—(119).

Complaint sufficient.

Complaint in an action to recover damages suffered by reason of the discharge of a sewer of defendant into a creek near plaintiff's land, and to enjoin the further use of such sewer, construed, and *held* to state a cause of action.

[1] Reported in 139 N. W. 140.

Note.—As to right of municipality to create nuisance by pollution at a point where its sewers discharge, see note in 20 L.R.A.(N.S.) 1050.

Prescriptive right of municipality to pollute streams with sewage or other harmful substance, see note in 25 L.R.A.(N.S.) 589.

On the question of liability for injuries to property from sewerage system not constructed according to any plan adopted by competent authorities, or constructed upon a defective plan, see note in 1 L.R.A.(N.S.) 952.

As to liability for pollution of waters by sewers generally, see note in 1 L.R.A.(N.S.) 124.

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Damages — finding sustained by evidence.

. The finding of the trial court on the question of damages is sustained by the evidence.

Action in the district court for Todd county for an injunction restraining defendant from the further use of a certain sewer and for $900 damages. The answer alleged that defendant constructed the sewer as a sanitary measure; that the outlet thereof was a natural watercourse; that there was no other feasible outlet therefrom. It also alleged that from April, 1908, to April, 1911, plaintiff was a member of the common council of the city of Staples and chairman of its sewer committee; that as such chairman he had charge of the sewer system and it became his duty to see that the sewer system and its outlet were kept in proper repair, but that he failed to have the alleged defects in the sewer remedied. The case was tried before Taylor, J., who made findings and as conclusion of law found that plaintiff was entitled to the injunction prohibiting defendant from discharging sewage into the spring brook in such manner that by the usual and natural flow of water in the stream into which the same was discharged the sewage would be deposited upon plaintiff's property. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

G. F. Cashman, for appellant.

E. A. Kling, for respondent.

Bunn, J.

This is an action to recover damages suffered by plaintiff by reason of the discharge of a sewer of defendant into a creek near plaintiff's land, and to enjoin the further use of such sewer. The case was tried by the court without a jury, and a decision made granting the injunction and assessing plaintiff's damages at $300. Defendant appeals from an order denying its motion for a new trial.

The first and principal contention of defendant is that it was error to overrule its objection to the admission of any evidence on the ground that the complaint did not state a cause of action. The material allegations of the pleading thus attacked are as follows:

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Plaintiff is the owner of an 80-acre tract of land in Todd county, near the city of Staples. He had constructed substantial buildings on the land, which were occupied by himself and his tenants. Prior to the construction and use of the sewer, plaintiff's property was worth $4,000, and its rental value $300 per year. In 1907 defendant constructed, and has since maintained, a system of sewers, which collected the sewage from the different portions of the city, and discharged the same in a creek on land immediately adjoining plaintiff's premises. This creek is a brook, which flows into Hayden's brook, which latter stream flows across plaintiff's land, and is naturally a slow, sluggish and winding stream. A ditch had before this time been constructed along this brook, in the same general direction, but leaving several places in the brook where, by reason of its windings, there had been formed bays and pockets, connected with the ditch, but in which water still remained. The sewer, ever since its construction, has collected and deposited on plaintiff's land large quantities of foul, offensive, decayed and poisonous matter, which polluted the water of the brook and filled the air with offensive and poisonous vapors. This has rendered the vegetation in plaintiff's meadow and pasture unfit for use, his buildings unfit for occupancy, and has deprived plaintiff of the use and enjoyment of his premises, to his damage in the sum of $900. It is alleged that the maintenance of the sewer by defendant and the discharge of the offensive and poisonous matter constitute a nuisance.

It is claimed that, because the complaint contains no allegation that defendant was negligent in constructing or operating the sewer, it fails to state a cause of action. Conceding that negligence must be alleged and proved, we still think the complaint amply sufficient as against a demurrer, and particularly as against an objection made for the first time at the trial, as in such case it should be given the most liberal construction. It is not the label that makes an act negligent or wrongful. The omission to say that it was negligence to deposit the foul sewage on plaintiff's land does not dispel the odor or restore the vegetation on his meadow. It cannot be said that the facts pleaded do not show a wrongful and negligent affirmative act

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of defendant which caused injury to plaintiff, and under any doctrine there is liability.

And the complaint may also be sustained on the theory that it shows an invasion of plaintiff's property rights, within the principle of McClure v. City of Red Wing, 28 Minn. 186, 9 N. W. 767, Tate v. City of St. Paul, 56 Minn. 527, 58 N. W. 158, 45 Am. St. 501, and Pye v. City of Mankato, 36 Minn. 373, 31 N. W. 863, 1 Am. St. 671. Granting that a city is authorized, except where prohibited by law, to discharge its sewage into a stream, and is not ordinarily, in the absence of negligence, liable to a riparian owner, that is not this case. It is true that the standard of municipal duty in the construction of sewers and drains is ordinary care; but this rule does not permit a positive trespass on private property, or an invasion of the owner's property rights. Fairly construed, the complaint in the case at bar alleges that defendant gathered and deposited upon plaintiff's land the accumulations of its sewers. This was not only an invasion of his rights of property, but a nuisance.

Defendant does not claim that the evidence was not sufficient to justify the decision of the trial court, except as to the amount of damages awarded. The court fixed the damages to plaintiff's property at $100 per year. Defendant contends that this is excessive, and not sustained by the evidence. It may be true that the witnesses for plaintiff, who testified on the question of rental value, based their opinions on reasons not strictly sound, as shown by their cross-examination. But we are unable to say that the amount of damages awarded is not fairly sustained by the evidence, applying the familiar rules that govern our action when asked to reverse a finding of fact.

Order affirmed.

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WILLIAM A. KEMPFERT v. GAS TRACTION COMPANY.[1]

December 20, 1912.

Nos. 17,821—(115).

Place of work — duty of master to warn servant of special danger.

Where the master orders his servant into a particular place to do and perform certain work, which place will be rendered dangerous and unsafe to the servant if the machinery connected therewith be without notice or warning set in motion, the master owes the servant so situated the duty of exercising reasonable care in protecting him from harm while so engaged.

Vice principal.

The act of a foreman having charge of the work, and who orders the servant into the place, in starting the machinery in motion without notice or warning, thus endangering the safety of the servant, is the act of the master, for which, if a negligent act, he is liable.

Question for jury.

Evidence *held* to present an issue for the jury within the rule stated, and that the trial court erred in directing a verdict for defendant.

Contributory negligence.

Plaintiff was not guilty of contributory negligence as a matter of law.

Action in the district court for Hennepin county to recover $4,000 for personal injuries. The answer denied any want of care on defendant's part and alleged that plaintiff, with others, was preparing to load one of defendant's gas traction engines upon a car for shipment, and after making proper examination of the various parts of the engine to see that it was in proper condition, one Shoening got upon the platform of the engine and started to back the engine, being entirely unaware that plaintiff was in a position of danger, thus

[1] Reported in 139 N. W. 145.

Note.—As to the duty of a master to adopt rules to protect servant, or to warn him, against dangers not reasonably to be apprehended, see note in 21 L.R.A.(N.S.) 89.

For vice principalship considered with reference to rank of superior servant, see note in 51 L.R.A. 513.

Vice principalship as determined with reference to character of act causing injury, see note in 54 L.R.A. 37.

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causing one of the wheels to pass over plaintiff's foot, causing the injuries complained of. The answer further alleged contributory negligence on the part of plaintiff and that he assumed the risk. The case was tried before Jelley, J., who directed a verdict in favor of defendant. From an order denying plaintiff's motion for a new trial, he appealed. Reversed and new trial granted.

Larrabee & Davies, for appellant.

Morton Barrows, for respondent.

BROWN, J.

This action was brought to recover damages for injuries alleged to have been caused by the negligence of defendant. A verdict was directed for defendant on the trial below, and plaintiff appealed from an order denying a new trial.

The facts are as follows: Defendant is a corporation, and as such engaged in the sale and manufacture of gasolene traction engines, having in its employ in and about its factory a large number of workmen. The engines so manufactured are of a very large type, weighing about six tons each. The main or drive wheel is 8 feet in diameter, and the tire or surface thereof 2 feet wide, thickly set with steel or iron spokes from the hub to the tire rim. It is operated as all gasolene motors are operated, and from a platform placed at the rear end of the engine. Plaintiff entered the service of defendant on May 31, as an apprentice, and was set to work in the repair of engines and putting them in shape for shipment to purchasers. He had about completed his apprenticeship at the time of the injury of which he here complains. During the term of his service he was under the direction and control of a foreman, who had charge and supervision of the work in which plaintiff was engaged, with authority to direct and give orders to the men employed in his department. There were about 15 workmen in his department of the work. On the day of the accident complained of plaintiff and his immediate associate had repaired and put in order an engine preparatory to its shipment, and by its own power had moved it to the door of the factory. Plaintiff claims, and so testified, that his foreman then ordered and directed plaintiff to oil the various parts of the

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engine, and plaintiff set about the performance of that work. He found a grease cup on one of the drivewheels out of order, and was directed by the foreman to remove or repair it. This he did, and went into the shop for that purpose, returning shortly to replace it and finish oiling. While he was in the shop, the foreman started the engine in motion, and it was running, though not in gear, when plaintiff returned. Plaintiff noticed this when he returned, but proceeded to the completion of the work he was ordered to do. To reach the grease cup and other places of oiling about the drivewheel, plaintiff was required to extend his hand in through the spokes of the wheel, a distance of 2 feet; and it is obvious that he was in a position of danger if the engine was suddenly moved or started by its own power. He stood close to the wheel in doing the work, and the foreman was aware of the fact that he was thus engaged, and was in position to see him there at work. While so engaged the foreman, without notice or warning to plaintiff, suddenly set machinery in gear and backed the engine 18 or 20 inches, and upon plaintiff's foot, thus causing the injury complained of.

At the close of plaintiff's case defendant moved the court for a directed verdict upon the grounds: (1) That no negligence on the part of defendant was shown; (2) that, if any negligence was in fact shown, it was that of a fellow servant; and (3) that it conclusively appeared that plaintiff was guilty of contributory negligence. The motion was granted; the precise ground thereof not being stated by the court.

1. We are of opinion, and so hold, that the learned trial court erred in so directing a verdict for defendant. We are unable to distinguish the case, on its facts, so far as concerns the negligence of defendant, from Cody v. Longyear, 103 Minn. 116, 114 N. W. 735; Dizonno v. Great Northern Ry. Co. 103 Minn. 120, 114 N. W. 736; Hess v. Adamant Mnfg. Co. 66 Minn. 79, 68 N. W. 774; Aho v. Adriatic Mining Co. 117 Minn. 504, 136 N. W. 310; Grbich v. Pittsburgh Iron Ore Co. 119 Minn. 365, 138 N. W. 309; Johnson v. St. Paul Foundry Co. 112 Minn. 352, 128 N. W. 293; Lohman v. Swift & Co. 105 Minn. 148, 117 N. W. 418. The safety of plaintiff while replacing the grease cup and

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oiling the drivewheel, to do which his arm was necessarily extended between the spokes of the wheel some 2 feet, required that the engine remain stationary until the work was completed. To move it without notice or warning would expose him to danger of bodily injury. It is true that the particular work, or the particular place of work, was not inherently dangerous. On the contrary, it was perfectly safe so long as the engine was not set in motion. Yet within the rule of the cases cited it was defendant's duty to exercise reasonable care to keep and maintain the place in safety, and the act of the foreman, its representative, in starting the engine, was the act of defendant, for which it is liable, if the act of the foreman was an act of negligence. That question was, on the evidence, one of fact. If plaintiff had been ordered to go beneath the engine to oil or repair parts not otherwise to be reached, and the foreman, while plaintiff was thus engaged, had, without notice or warning, started the engine in motion and ran it over plaintiff, the case would be parallel for all practical purposes with some of those cited. The actual situation here presented differentiates the case from those cited in degree only.

2. The plaintiff's contributory negligence does not so conclusively appear as to justify a directed verdict against him. He had the right to proceed with the work on the assumption that the foreman, who had ordered him into the place, would not, with knowledge of his presence, attempt to start the engine in motion; and it cannot be said as a matter of law that he was negligent in so assuming, or in not guarding against an act of that kind. It so happened that plaintiff's foot was in position to be crushed by the drivewheel, if it was unexpectedly moved; but he was not required to anticipate any such movement.

Order reversed, and new trial granted.

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WILLIAM W. HUMPHREY v. MONIDA & YELLOWSTONE STAGE COMPANY.[1]

December 20, 1912.

Nos. 17,942—(55).

New trial.

The trial court did not abuse its discretion in denying defendant's motion for a new trial.

After the former appeal, reported in 115 Minn. 18, 131 N. W. 498, defendant moved for a new trial on the ground of newly discovered evidence. From an order denying the motion, Orr, J., defendant appealed. Affirmed.

James R. Hickey and *James R. Martin,* for appellant.

Edward B. Graves, Martin H. Albin and *Marcus D. Munn,* for respondent.

START, C. J.

This is the second appeal in this case, and is one from an order of the district court of the county of Ramsey denying the defendant's motion for a new trial on the ground of newly discovered evidence.

The action was commenced in July, 1908. The complaint alleged that the plaintiff, a stockholder of the defendant, advanced to it $2,500 to be used in the payment of its debts, which it promised to pay on demand at any time after it was financially able to do so. These allegations were denied by the answer. On the trial of the action the plaintiff gave evidence tending to show that he advanced to the defendant $2,500, which was to be repaid. The defendant admitted that it received from the plaintiff the sum of $2,500, but introduced evidence tending to show that it never received any money from the plaintiff as an advancement or loan, as he claimed; that the money received by it was in payment of 25 shares of its unissued capital stock, then issued to a third party at the plaintiff's request. The plaintiff in turn claimed in effect that the stock so

[1] Reported in 139 N. W. 132.

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issued was his own, for which he had not received a certificate; hence the number of shares of stock the plaintiff was entitled to and the number issued to him became material. He claimed that he was entitled to 230 shares of stock, while the defendant claimed that he was entitled only to 80 shares, which were issued to him long before it received from him the $2,500 in payment of the 25 shares of treasury stock. These respective claims of the parties were submitted to the jury, and on April 29, 1909, a verdict was returned for the plaintiff for the amount claimed. The defendant then made a motion for judgment notwithstanding the verdict or a new trial, which was denied, and the defendant appealed to this court from the order denying the motion. This court affirmed the order. See 115 Minn. 18, 131 N. W. 498. The case was remanded, and on December 16, 1911, more than two years and seven months after the verdict was returned, the motion for a new trial was made on the ground of newly discovered evidence.

It appears from the moving papers on the motion for a new trial that, while the first appeal was pending, an equity action, in which the parties were the same as in this action, was commenced in the district court of the county of Ramsey for the purpose of having it adjudged that the plaintiff was the owner of 80 shares of the capital stock of the defendant, and to compel it to issue to him a certificate therefor. This equity action was tried by the court without a jury, and resulted in findings of fact and the conclusion of law that the plaintiff was not the owner of the 80 shares of stock, and that the defendant was entitled to judgment in its favor on the merits. On the trial of the equity action, the defendant introduced a written agreement between the plaintiff herein and F. J. Haynes, as partners under the firm name of Humphrey & Haynes, and W. Seward Webb, whereby it was agreed that 80 shares of the capital stock of the corporation, the defendant, to be organized, and which was later organized, to take over the property and business of the firm, should be issued to Mr. Webb. This agreement, if it had been offered on the trial of this action, would have been relevant and material evidence on the question as to the number of shares of the corporation the plaintiff was originally entitled to. It was not, however, offered in evi-

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dence, and it constitutes, with certain telegrams, the principal item of the alleged newly discovered evidence.

The record in this case is practically conclusive that the existence of the agreement and telegrams was at all times known to F. J. Haynes, who had been the president and director of the corporation since its organization, and who signed the agreement and sent or received all of the telegrams, and, further, that a carbon copy of the agreement had been, for some years prior to the trial of this action, in the possession of the defendant or its president, Haynes. It is not claimed by the defendant that this item of evidence is strictly newly discovered, but that it was not able by the exercise of due diligence to procure it before the trial of the action. This claim is based upon the affidavit of defendant's president, Haynes, and its attorney, to the effect that prior to the trial they each had made inquiries as to the whereabouts of Mr. Webb, with a view of obtaining from him the agreement referred to and his deposition, but were unable to do so. Whether the defendant exercised due diligence in the premises was a question addressed to the discretion of the trial judge.

It is quite significant that the record does not show why the defendant did not offer the carbon copy of the agreement in evidence, either as original or secondary evidence; the original being out of the jurisdiction of the court and in possession of a stranger to the action. See Kleeberg v. Schrader, 69 Minn. 136, 72 N. W. 59, and International Harvester Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252, 12 L.R.A.(N.S.) 343, 118 Am. St. 626, 11 An. Cas. 107. Nor is there any satisfactory explanation of the delay of two years and seven months after the verdict was returned in making the motion for a new trial on the ground of newly discovered evidence of which it had full knowledge before the trial commenced, or why this matter was not included in the original motion for a new trial.

All other items of newly discovered evidence relied upon in support of the motion for a new trial have been considered, and it is quite apparent from the record that the evidence might have been discovered and procured before the trial by the exercise of any kind of diligence. We therefore hold that the trial court did not abuse its discretion in denying the motion for a new trial.

Order affirmed.

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STATE v. MARGARET A. McCORMICK.[1]

December 20, 1912.

Nos. 17,981—(262).

Municipal ordinance unreasonable.

An ordinance of the city of Minneapolis, designed to prevent the spreading of fires and to protect human life, which singles out the "two-story frame building," and enacts that it shall be unlawful for the owner thereof to furnish or lease the third or attic floor to a person or group of persons living independently of those occupying the lower floors, is *held* discriminatory, unreasonable, and void, since it does not include other buildings equally exposed to danger of fire, such as "the three-story frame building," or the brick or concrete two-story buildings, not of fireproof construction.

From a judgment of the municipal court of Minneapolis, Leary, J., convicting her of the violation of an ordinance of the city of Minneapolis, defendant appealed. Reversed.

Mead & Bryngelson, for appellant.

Daniel Fish, City Attorney, and *W. G. Compton,* Assistant City Attorney, for respondent.

BROWN, J.

Defendant was convicted of the violation of an ordinance of the city of Minneapolis, and appealed from the judgment rendered against her.

The facts are as follows: Defendant erected and was the owner of a two-story frame residence building, situated on West Lake street, and in the construction of the same completed and furnished the attic or third floor for occupancy by tenants, practically the same as the floors below were completed and furnished, making two complete flats on each of the three floors suitable for occupancy by separate families. She subsequently leased one of the third-floor flats to a family having no relation to and living independently of the occupants of the floors

[1] Reported in 138 N. W. 1032.

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below. This the city contends constituted a violation of a provision of its building ordinance which prohibits the constructing or occupancy of the third floor of such a building in the manner and under the circumstances stated. The ordinance, in so far as here material, provides:

"It shall be unlawful to build, furnish, or occupy any room or group of rooms above the second story of any two-story frame building as the home for any family or group of persons living independently of the families on the first or second floors of such building."

The validity of this clause of the ordinance is challenged by defendant, and the soundness of her contention in this respect presents the only question for our consideration. The state seeks to sustain the ordinance as police regulation designed in a measure to prevent fires and conflagrations, and to lessen the danger to human life in the case of the burning of dwellings in which several families dwell. The state refers to certain provisions of the city charter under which it is claimed the ordinance was properly enacted. Those provisions are as follows:

"To regulate the location and construction of smokehouses * * * and to make any other provisions to guard against fire, or to prevent the spreading of fires which the city council may deem proper," and

"Also to require such owner or lessee to construct, provide and furnish each and every other thing, and to do each and every other act which it may think necessary or advisable to lessen danger to human life in case of fire or accident."

It may be conceded, without stopping to consider or decide the question, that the provisions of the charter quoted confer ample authority upon the city council, within reasonable limits, to enact such ordinances and regulations, having for their purpose the prevention of fires, and the protection of human life, as the members of that body may deem necessary. But it is clear that it does not authorize a discrimination between buildings which are equally exposed to the danger sought to be guarded against.

The ordinance in question singles out the "two-story frame

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building," and declares that in a building of that character the third or attic floor shall not be furnished for the habitation of persons living independently of those on the floors below, leaving all other buildings, erected for the same purpose and equally susceptible to fire, immune and free from the operation of the law. No reason is suggested to support the theory that the "two-story frame building" is exposed to dangers peculiar to that type of residence buildings, or to differentiate it from the "three-story frame building," or the ordinary brick or concrete structure, not of fireproof construction, the interior finish of which is composed of wooden material. All are equally exposed to the danger of fire. The reason for the attempted regulation applies to each. The result, if the ordinance be sustained, will be to exempt from its operation the latter class of buildings with no basis for the distinction.

It must be held, therefore, that the ordinance—that is, the particular provision here in question—is void as class legislation, an unwarranted discrimination, and unreasonable and void.

Judgment reversed.

STATE ex rel. BALLORD-TRIMBLE LUMBER COMPANY v. DISTRICT COURT OF CLAY COUNTY and Others.[1]

December 20, 1912.

Nos. 18,010—(272).

Venue — primary purpose of action.

The general rule is that actions must be brought and tried in the county where the parties reside; but if the subject-matter of the action is situated in a county other than the one in which the parties reside, and the primary purpose of the action and the principal relief sought relate to such subject-matter, then the action must be brought and tried in the county where such subject-matter is situated. It is not sufficient to bring a case within the exception to the rule that the complaint asks for relief as to the subject-matter which is merely incidental to the primary purpose of the action.

Transitory action.

Complaint construed, and *held*, that the primary and principal relief

[1] Reported in 139 N. W. 135.

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sought to be obtained by the action was an accounting, with the cancelation of a real estate mortgage as incidental relief, and that the action is a transitory one.

Corporation — home office — change of venue.

The words "residence" and "home" are not, as ordinarily used, synonymous; but when used, as in this case, with reference to a corporation and its general office, the word "home" is the equivalent of "residence." The affidavit herein for the change of the place of trial was sufficient. The change of the place of trial was not waived.

Petition by Ballord-Trimble Lumber Company for an alternative writ of mandamus, directing the judges and clerk of the district court for Clay county to strike from the trial calendar of that court the case of Tully v. Ballord-Trimble Lumber Company, and transmit the records to the office of the district court for Hennepin county, or show cause why they had not done so. Peremptory writ granted.

Corrigan & Darling, George Conway, and *V. C. Sherman,* for petitioner.

W. B. Douglas and *Charles S. Marden,* for respondents.

START, C. J.

This is a petition, heard on an order to show cause, for a peremptory writ of mandamus, directing the district court of the county of Clay and the judges thereof to transfer all the papers and files in the case of D. W. Tully v. Ballord-Trimble Lumber Company, which was brought in the county of Clay, to the district court of the county of Hennepin. Subsequent to the service of the summons on the defendant in such action, and before the time for answering had expired, it served upon the attorney for the plaintiff an affidavit of residence of defendant and a demand that the place of trial be changed from the county of Clay to the county of Hennepin, and the originals of such affidavit and demand, with due proof of service, were filed with the clerk of the court of the county of Clay, who refused to transmit the papers and files in the action to the clerk of the district court of the county of Hennepin.

The affidavit, so far as here material, is as follows: "H. L. Trim-

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ble, being on oath, duly sworn, says: That he is the president of the Ballord-Trimble Lumber Company, the defendant corporation in the above-entitled action. That at the commencement of said action the home and general office of the Ballord-Trimble Lumber Company was and still is in the city of Minneapolis, county of Hennepin, and state of Minnesota, and that all of its books and records are kept in the said general office of the defendant company in the said city of Minneapolis. That the defendant, the Ballord-Trimble Lumber Company, keeps all of its books and records of original entry in its said general office in the city of Minneapolis, and that none of its records as original entries are kept within the county of Clay, in the state of Minnesota."

The defendant thereafter answered, and the plaintiff replied, and noticed the cause for trial in the district court of the county of Clay, and caused the case to be placed upon the calendar of the court for trial. Thereupon the defendant moved the court to strike the cause from its calendar and to direct the clerk to transmit the files and records in the action to the clerk of the district court of the county of Hennepin. The motion was denied. Thereupon the defendant applied to and obtained from this court an order to show cause.

The contention of the respondents is to the effect that the order to show cause should be discharged for the reasons following:

1. The action, as shown by the allegations of the complaint, is a local one; hence the venue was properly laid in the county of Clay, or, in other words, the action is primarily one to cancel the record of a mortgage on land in that county.

If the premises of this contention be correct, the conclusion is also. Kommer v. Harrington, 83 Minn. 114, 85 N. W. 939.

The complaint alleges in effect that at Barnesville, this state, between March 16, 1901, and August 16, 1909, the parties had mutual dealings, during which time the plaintiff purchased from the defendant large quantities of lumber and other merchandise; that between such dates there was an open and mutual account growing out of such purchases and payments, and on April 27, 1908, the defendant falsely represented to the plaintiff that he was indebted to it on such account in the sum of $1,200, and demanded that he execute to it his

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promissory note in that sum and secure it on real estate owned by him in the county of Clay, such sum to be credited on his account; that the plaintiff, relying on such false representation and believing it to be true, executed such mortgage; that such representation was untrue, as defendant then well knew, and in reliance thereon the plaintiff overpaid such mutual account in the sum of $2,000; that the plaintiff has repeatedly requested the defendant to enter into an accounting with him to determine the exact condition of the account, but it has at all times refused so to do; and, further, that such account is long and contains a great number of items, and the best interests of the parties require the appointment of a referee to take the evidence and state the account. The relief prayed for was for a general accounting between the parties under the direction of the court, and that the defendant be required to cancel and surrender the note and mortgage.

The general rule is that actions must be brought and tried in the county where the parties reside; but if the subject-matter of the action is situated in a county other than the one in which the parties reside, and the primary purpose of the action and the principal relief sought relate to such subject-matter, then the action must be brought and tried in the county where such subject-matter is situated. It is not sufficient to bring a case within the exception to the rule that the complaint asks for relief as to the subject-matter which is merely incidental to the primary purpose of the action. Smith v. Barr, 76 Minn. 513, 79 N. W. 507; Kommer v. Harrington, 83 Minn. 114, 85 N. W. 939; State v. District Court of Chippewa County, 85 Minn. 283, 88 N. W. 755; State v. District Court of Pine County, 94 Minn. 370, 102 N. W. 869, 3 An. Cas. 725.

The first case cited clearly states the general rule and the exception. The defendants in that case purchased at an administrator's sale several tracts of land, some of which they sold; but they still had a part of them. An action was brought by the heirs of the deceased against the purchasers, on the ground that the sales to them were void, to compel them to reconvey the lands which they still held, and to account for the proceeds of those they had sold. It was held that the accounting was itself a part of the principal and primary relief asked for, and that the action was properly brought in the county where the de-

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fendants resided, although none of the lands were situated in that county. If the allegations of the complaint here in question be read and construed in the light of the rule stated, it is clear that the primary and principal relief sought to be obtained by the action is an accounting, and that the relief as to the cancelation of the mortgage is merely incidental to an accounting between the parties. We therefore hold that the action is a transitory one.

2. The respondents also urge that the affidavit for a change of the place of trial is insufficient, for the reason that it is stated therein that the defendant's home, instead of residence, and general office, where all its books and records were kept, were in the county of Hennepin. While the words "residence" and "home" are not, as ordinarily used, synonymous, yet we are of the opinion that when used, as in this case, with reference to a corporation and its general office, the word "home" is the equivalent of "residence," and that the affidavit of residence was sufficient.

It is further urged in this connection that it conclusively appears from the record that the relator's residence is the county of Clay. This claim is based upon the fact that the relator's original articles of incorporation named, as its principal place of business, Barnesville, in the county of Clay. The articles of incorporation, however, were amended in October, 1906, and the certificate thereof filed with the Secretary of State, wherein the city of Minneapolis, county of Hennepin, and state of Minnesota was designated as the principal place for transacting the business of the corporation. The certificate of the amended articles was not filed and recorded in the office of the register of deeds of the county of Clay. It is not clear whether the certificate of the amended articles of incorporation should have been filed in the county of the corporation's principal place of business, as specified in such certificate, or in the county specified in the original certificate of incorporation. See R. L. 1905, §§ 2850, 2871. It is not necessary to decide this question, for it appears from the record that the defendant's bona fide and de facto residence has been, since 1906, and now is, in the city of Minneapolis and county of Hennepin, where all of its books and papers are kept. We accordingly hold that the county

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of Hennepin was the defendant's place of residence at the time of the commencement of this action.

3. The last contention to be considered is that the defendant waived its right to have the action tried in the district court of the county of Hennepin. The alleged reasons urged in support of this claim are to the effect that, after the defendant made and served its affidavit and demand for a change of the place of trial of the action and filed them, with proof of service with the clerk of the court, it served an answer, also an amended answer, in which the venue was laid in the county of Hennepin, and for this reason the plaintiff returned them, and then made a motion in the district court of the county of Clay to strike out the defendant's amended answer. The defendant appeared and argued the motion, and the court made its order determining the motion, a copy of which was served upon defendant's counsel, who admitted due service thereof. The plaintiff caused the case to be placed on the calendar for trial, and the defendant then moved the court to strike it from the calendar and to direct its clerk to transmit the papers and files to the clerk of the district court of the county of Hennepin. These acts on the part of the defendant do not constitute a waiver of its right to have the case tried on the merits in the county of Hennepin, to which county the place of trial was ipso facto changed on filing with the clerk the affidavit and demand, with proof of service thereof. State v. District Court of Meeker County, 77 Minn. 302, 79 N. W. 960; Bell v. Jarvis, 98 Minn. 109, 107 N. W. 547, 8 An. Cas. 938.

It is to be noted that the amended answer, in which the motion to strike out was made, laid the venue in the county of Hennepin, and, by consent of the parties, the motion could have been heard by any district judge willing to hear it. The appearance of the defendant, after the case was noticed for trial and placed on the calendar, was for the purpose of making the necessary motion to secure an order of the court directing its clerk to transmit the papers and files to the district court of the county of Hennepin. It follows that the place of trial of the action was legally changed, and that the right thus secured has not been waived.

Let the writ issue.

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FIRST NATIONAL BANK OF HASTINGS v. CORPORATION SECURITIES COMPANY.[1]

December 27, 1912.

Nos. 17,751—(118).

Complaint construed.

The allegations of the complaint in this action, outlined in the opinion, *held*, as against a demurrer, to state facts showing the breach of a valid executory contract for the sale and purchase of certain personal property.

Action in the district court for Hennepin county for specific performance of an agreement to buy 15 shares of stock or to recover $2,250 in case specific performance be not decreed. From an order, Jelley, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Reversed.

Brown & Guesmer and *Harry S. Carson,* for appellant.

Spooner, Laybourn & Lucas, for respondent.

BROWN, J.

The complaint in this action alleges the following facts:

That plaintiff is a banking corporation organized under the laws of the United States. That defendant is a corporation organized under the laws of the state of Delaware, having an office and doing business in this state. "That on or about the 27th day of April, 1911, at the city of Minneapolis, Minnesota, for a valuable consideration, the said defendant agreed, on or before August 1, 1911, to purchase from E. B. Bradford fifteen (15) shares of the capital stock of the Crocker State Bank, of Crocker, South Dakota, the said Crocker State Bank being a banking corporation organized and existing under the laws of the state of South Dakota, said 15 shares of stock being evidenced by two certain certificates, one numbered 12 for five (5) shares, and one numbered 13 for ten (10) shares, the said shares being of the par value of one hundred dollars ($100) each, and the said shares being

[1] Reported in 139 N. W. 296.

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then, at the time of the said agreement, the property of the said E. B. Bradford. As a part of said agreement said defendant agreed to pay said Bradford for said shares the price of one hundred fifty dollars ($150) per share, the same being a total of two thousand two hundred fifty dollars ($2,250) for all of the said 15 shares."

The complaint further alleges that thereafter, on April 28, 1911, for a valuable consideration, said Bradford assigned and transferred the stock, together with his interest in defendant's agreement to purchase, to plaintiff, and that plaintiff has ever since been and still is the owner and holder of the same. It also alleges that plaintiff tendered the stock to defendant and demanded that it purchase the same in accordance with the Bradford agreement, and that defendant refused and ever since has refused to comply with said agreement. The complaint further alleges that the stock has no market value, is not quoted in commercial reports, nor sold on the market, and since August 1, 1911, has had no value; that plaintiff still holds and tenders the stock to defendant, and brings the same into court for the use and benefit of defendant; that plaintiff has no adequate remedy against defendant, except by specific performance of the contract. The complaint also alleges that plaintiff has been damaged by defendant's refusal to perform the agreement in the sum of $2,250, and demands as relief: (1) Specific performance; or, if that be denied, (2) judgment for $2,250, as damages for the breach of contract.

Defendant interposed a general demurrer, which the trial court sustained. Plaintiff appealed.

The principal question presented is whether the allegations of the complaint affirmatively show an enforceable contract between Bradford and defendant, by which Bradford agreed to sell and defendant agreed to purchase the stock. It is contended by defendant that no such contract is pleaded; that at most the complaint shows only an agreement to purchase on the part of defendant, and wholly fails to allege any fact disclosing an obligation on the part of Bradford to sell; hence that the contract is unilateral and unenforceable for want of mutuality of agreement.

We do not sustain this contention. The complaint may be sus-

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tained on the theory of an express contract binding upon both parties. Whether plaintiff is entitled to damages for a breach of the contract, or to the specific performance of the same, we do not consider. We simply hold that upon the face of the complaint, aided by the permissible inferences, as against the demurrer, a valid contract is shown by its allegations. It is probable that the pleading is technically defective in not containing an express allegation that Bradford agreed to sell the stock to defendant, thus showing mutual obligations—an obligation to sell on the part of Bradford, and an obligation to purchase on the part of defendant. But the omitted allegation may be supplied by intendment, and the complaint held sufficient.

The rule guiding the court in the construction of pleadings, when challenged by general demurrer, is well settled. As expressed by Judge Elliott, a pleading will be held sufficient when the necessary allegations may be gathered from all the averments, although it is deficient in logical order and technical language. And as against a demurrer it will be construed to state all facts that can reasonably be implied from the allegations made. Facts so implied are traversable in the same manner as though directly stated. Vukelis v. Virginia Lumber Co. 107 Minn. 68, 119 N. W. 509. The complaint in the case before us expressly alleges that defendant for a valuable consideration agreed to buy the stock from Bradford. The natural inference from this allegation is that Bradford at the same time agreed to sell the stock. This inference is permissible within the rule stated, and, construing the complaint as containing that allegation, a valid assignable contract is shown.

Order reversed.

A petition for rehearing having been filed, the following opinion was filed on January 7, 1913:

PER CURIAM.

The rule guiding this court in determining the sufficiency of a complaint, when challenged by general demurrer, is that the demurrer will be overruled if, on any view of the facts pleaded, a cause of action is stated. The court will not ordinarily go beyond this inquiry, or at-

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tempt to pass upon the question whether recovery may or may not be had upon all the different theories to which the facts pleaded may be susceptible. The court limits its inquiry to the question whether, upon any particular theory, a cause of action is stated. In the case at bar we held that the complaint stated a cause of action for the breach of an express contract. We did not consider the question whether plaintiff might or might not be entitled to recover upon some other theory. We make this addition to the opinion, to the end that there may be no misunderstanding of the former decision.

Application for rehearing denied.

STELLA PELOWSKI v. J. R. WATKINS MEDICAL COMPANY and Another.[1]

December 27, 1912.

Nos. 17,780—(128).

Action for wrongful death — defendant contractor not entitled to directed verdict.

A cornice in a brick wall faced with cut stone, in process of erection, fell and killed a laborer of a subcontractor engaged in setting the cut stone. The general contractor was doing the brickwork, and imbedded in the masonry the steel anchors which secured the stone facing to the brick part of the wall, and by contract with the subcontractor doing the stonework stipulated that the latter should do the work in a workmanlike manner and under the direction and to the satisfaction of the general contractor, and prosecute the several parts thereof at such time and in such order as the general contractor might direct. The stonesetting and bricklaying proceeded somewhat dependently, in that after each course of stone was set the brick wall was required to be built up even therewith and anchored thereto before the next stone course could be set. The general contractor's superintendent was always at the works, and observed the way in which it was done, and there is some evidence that he exercised authority over

[1] Reported in 139 N. W. 289, 618.

Note.—On the question of negligence of fellow servant concurring with failure of the master to establish or enforce proper rules or regulations for conduct of business, see note in 4 L.R.A.(N.S.) 516.

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the stonesetters. *Held*, that the general contractor, in a suit brought against him for the wrongful death of the laborer so killed, was not entitled to a directed verdict.

Special findings not contradictory.

The special finding of the jury that the stonesetters were not negligent does not indicate perverseness, nor does it impugn the general verdict and the special finding that the defendant's negligence was the proximate cause of the death of plaintiff's intestate, so that a new trial should be had.

Verdict sustained by evidence.

The evidence justifies the verdict that defendant's negligence was the proximate cause of the death sued for.

Charge to jury.

No prejudicial errors resulted to defendant from the instructions given to the jury, nor from a refusal to give a requested instruction.

Action in the district court for Winona county by the administratrix of the estate of Paul Pelowski, deceased, to recover $7,500 for the death of her intestate. The case was tried before Snow, J., who, at the close of the testimony denied the motion of defendant Wells Brothers Company for a directed verdict, and a jury which answered the special questions set out in the opinion and returned a verdict for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

P. J. McLaughlin, for appellant.

W. J. Smith and *Webber & Lees,* for respondent.

Holt, J.

In this action for wrongful death the administratrix recovered the full amount permitted by the statute. The defendant Wells Brothers Company appeals from the order denying its blended motion for judgment notwithstanding the verdict or a new trial.

There is very little conflict as to the facts in this case. The J. R. Watkins Medical Company, one of the original defendants, caused to be constructed on its premises in Winona a substantial business block or building. It let the contract for its construction to the defendant

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the Wells Brothers Company, a corporation. The latter retained the concrete, brick and carpenter work, but sublet the furnishing and setting of the stone work to the Reed Stone Company, who, in turn, sublet the setting of the stone in the wall to Lowrie & Son. The building was only one story, but the walls, resting on concrete foundation, were over 30 feet in height, and were of brick, veneered or faced with Bedford cut stone. From the foundation to the top or caps of the windows, 26 feet above the foundation, the walls were not less than 2 feet thick; about 3 feet higher, or where the ceiling was to be, the brick backing was reduced to about 12 inches and the stone veneer was 5 inches. From the foundation to the cornice the exterior veneer of the walls, where not made up of pilasters or ornamental columns, consisted of large slabs of this sawed or cut Bedford stone. The width of each slab—that is, the distance it extended into the wall—varied from 4 inches up.

In the erection of the wall Lowrie & Son, by their stonesetters, would set a course of this veneer, followed by the bricklayers of Wells Brothers Company, who would fill in with brick and lime and cement mortar to the top of the stone course and anchor that to the brick. Each stone had two holes cut in the upper edge close to the side next to the brick, and an inch wide groove, not so deep as the holes, from these to the brick backing. To hold the stones secure in the wall there were provided so-called anchors, 8 or 10 inches long and an inch wide, of quarter-inch steel or iron, with a one-inch bent at one end to fit into this hole in the stone, and the other end bent the same way, only the hook a little longer, to pass over the brick and imbed in the mortar, thus making, with the mortar between the brick and stone, a solid wall of masonry. The anchors were furnished by Lowrie & Son, but were placed and imbedded in the mortar by the bricklayers.

When it came to the cornice, we find that the plans called for, first, a course of stone 1 foot 3½ inches in height and projecting 4½ inches beyond the stone course below it; the next course consisted of stones 1 foot 7 inches in height, projecting 7½ inches beyond the first course; the third course was 9 inches in height, and projected over the second course 9 inches; the fourth course was 9 inches in height, and projected over the third course 6 inches; the fifth course, called the ashlar, 2

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feet 2 inches high, about 6 feet long and 4 inches wide, was to be placed so that the inside surface thereof would be on line with the outside wall under the first cornice course. The stones for the first, second, and fourth of these courses were of such width that it required brick-backing of from 8 to 12 inches to produce the full width of the wall; while the third course, called the binder, consisted of stones 3 feet 3 inches wide, reaching to the inside line of the wall, and hence not requiring any brick backing. Each of the first four courses which projected had the under projecting surface beveled and planed off into mouldings or ornamental grooves. The only means adopted to prevent the projection or overhang of the cornice from tipping the wall over, outside of using the small steel anchors mentioned, were that under the first course in the cornice were placed props, consisting of inch boards, one end of which supported the cornice stone and the other end rested 3 feet below on the ledge above the window caps, and also by two steel or iron anchors in each of the stones in the third course, which, as stated, were wide enough to occupy the whole wall. These last anchors were rods of ⅝-inch iron about 3 feet long. In the upper side of the stone near the inside edge was a hole drilled, one end of the anchor was bent over the edge of the stone and sunk into this hole, and the other end, which hung down on the inside brick wall, was also bent so that about 3 or 4 inches thereof, sharpened at the end, pointed straight into the wall. This, when driven into the brick wall, tended to prevent the stones of the third and those of the fourth courses, extending further out from the wall, from tipping.

This cornice had been fully completed to and including this third course, and the anchors driven into the brick wall. Whether the stonesetters or bricklayers had driven these in does not appear. On the day previous to the accident the stones on the fourth course had all, or nearly all, been set. There is some dispute as to how many, if any, were lacking. One, or, as some claim, two or three, of the ashlar stones had also been set. But the bricklayers were engaged upon other parts of the building, and had not backed this fourth course, or begun to do so.

About 8:30 in the morning of August 30, while the stonesetter was engaged in setting, either one of the stones lacking in the fourth

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course, or else an ashlar stone, the whole cornice on the north wall, 68 feet in length, fell, carrying with it nearly all of the brick backing. Plaintiff's intestate, Paul Pelowski, in the employ of Lowrie & Son, at that time working at the derrick below the cornice, was instantly killed by one of the falling stones.

Plaintiff, Pelowski's widow, as administratrix, brought this action against the J. R. Watkins Medical Company and Wells Brothers Company for damages for the wrongful death of her intestate, setting up the contract relation between the two defendants, that the defendant Wells Brothers Company employed Lowrie & Son to set the stone in the walls, that said Lowrie & Son and said Wells Brothers Company did erect and construct the walls and cornices, that in the work Lowrie & Son were subject to the directions and under the control of the defendants, that defendants failed to supervise and control the erection of the walls and cornices, but they allowed the walls and cornices to be laid and constructed in a negligent and unsafe manner, and that while Paul Pelowski was at work for Lowrie & Son near the north wall of the building, the cornice, because of defendant's negligence in allowing the wall and cornice to be constructed in a negligent and unsafe way, fell and killed Pelowski. When plaintiff rested, the case was dismissed as to defendant J. R. Watkins Medical Company on its motion. At the close of the evidence the defendant Wells Brothers Company moved for a directed verdict. The motion was denied, and the case submitted to the jury. Under the direction of the court, the jury, in addition to the general verdict, was required to answer certain questions. These questions and answers are as follows:

Question: "Were the stonesetters guilty of negligence in setting or anchoring the stone in the cornice which fell?" Answer: "No."

Question: "Was the defendant Wells Brothers Company negligent in the execution of its part in the construction of the cornice which fell?" Answer: "Yes."

Question: "If you answer 'yes' to question No. 4 [preceding question], then state in what particular defendant Wells Brothers Com-

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pany was negligent." Answer: "In not building brick backing behind fourth course of stone."

Question: "If you find Wells Brothers Company was negligent, was such negligence a proximate cause of the accident resulting in the death of plaintiff's husband?" Answer: "Yes."

Upon this appeal the amount of the verdict is not assailed, nor are any rulings of the trial court upon the submission or exclusion of evidence. The errors assigned relate to defendant's right to an instructed verdict, to the contention that the verdict is perverse, and should not be permitted to stand, and to alleged errors in the instructions to the jury and refusal to give one requested by defendant.

In determining whether or not defendant was entitled to a directed verdict, consideration must be given to the position Wells Brothers Company occupied in the construction of the wall and cornice. The plans called for a wall with cornice of one solid piece of masonry, save where openings were provided for windows and doors. The outside veneer of stone was to be joined to the brick inside in the process of erection, so as to make the wall an integral mass. The defendant reserved to itself the placing of the brick in the wall, and did join or anchor the stone veneer to it. Necessarily the stone was set before the brick to which it should be joined could be laid. And when it came to the cornice, where each course of stone was to project outside of the one below it, it must be apparent that the safety of the structure suggested the necessity of immediately following up with the brick course and anchoring it securely to the stone. It may be that the laying of the whole fourth course of the stone in the cornice without the brick-backing would not have caused the fall, and that this attempt to place some of the ashlar stones was the straw that broke the camel's back; but there is also ample evidence in the record to sustain the finding of the jury that the accident would not have happened if this fourth course had been backed with brick and anchored. The question is not so much what particular act caused the cornice to fall as this: Did any duty rest on defendant, by virtue of its contract with the subcontractor, or from the position it took in erecting the

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wall, to see to it that the persons who had a right to be on the street below were not endangered thereby?

It is clear that as to such persons, if injured by a fall of this wall, a prima facie case is made out by proof that the wall fell, that injury resulted therefrom, and that defendant was taking part in its construction. That some one else was also doing part, or at fault in the doing thereof, would not excuse defendant from responsibility for the joint enterprise. But there is an additional reason in the relation existing between defendant and Lowrie & Son. The defendant, in its contract with Reed Stone Company, under whom Lowrie & Son were employed, very properly inserted this provision:

"The subcontractor will commence work immediately upon notice so to do, proceed with the said work and every part thereof in a prompt and diligent manner, prosecuting the several parts thereof at such time and in such order as the general contractor may direct, and will progress its work with the other works of the building and sufficiently in advance of them so as not to delay the progress of the construction of the building."

Under the provision quoted Wells Brothers Company had the undoubted right to stop the setting of the stone till it had opportunity to lay the brick and properly anchor and join thereto the stone already set. And we think that under this reserved right, as well as because the wall and cornice were the joint product of defendant and Lowrie & Son, there rested a duty on both to see to it that it was so erected as not to endanger the life of one who might be on the street below. The defendant was not entitled to a directed verdict. As to the construction of contracts with similar provisions, see Carlton County Farmers Ins. Co. v. Foley Brothers, 117 Minn. 59, 134 N. W. 309, 38 L.R.A.(N.S.) 175.

Because the jury found that the stonesetters were not negligent in setting or anchoring the stone in the cornice which fell, counsel for defendant contends that the general verdict and the special findings that defendant was negligent in failing to brick-back and anchor the stones in the fourth course, and that such negligence was the proxi-

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mate cause of the fall, are perverse and cannot stand. The submission of the question of the negligence of the stonesetters to the jury may be regarded as of doubtful propriety; for, as has been above indicated, negligence of Paul Pelowski's fellow servants or his master does not absolve defendant from liability, if its negligence concurred with theirs to bring about his death. Citation of authorities need scarcely be made to the proposition that, where the negligence of two concur as the proximate cause of an injury, it is no defense for the one to say that the other concerned in the act is not also sued, or by reason of the fellow servant rule is not liable. Coleman v. Minneapolis Street Ry. Co. 113 Minn. 364, 129 N. W. 762. Therefore, even if the jury's finding of no negligence on the part of the stonesetters be wrong, it does not necessarily discredit their general verdict or special finding that defendant's negligence caused the death.

Furthermore, the record sustains the trial court's view that there was evidence to submit to the jury from which it could be found that the wall and cornice were constructed as to the stonesetting under defendant's direction, even if the express terms of the contract pursuant to which the work was done be construed as not so providing. The defendant had its superintendent continually on the work, who says, with reference to these very stones in the fourth and fifth courses, that it was his duty to observe when and how they were laid, that he did so do, and that when the stonesetter placed the next to the last ashlar stone hoisted to the cornice prior to the accident temporarily in a position to endanger the wall, he at once directed a different handling thereof, which direction was immediately complied with, thus showing that directions were given by defendant as to the manner of doing the work by the stonesetters, and that the latter understood their duty to follow such directions.[1] In that view of the situation the defendant was negligent, not only in failing to back and anchor the fourth course in the cornice, but also in suffering Lowrie & Son to begin to set the ashlar course, thereby endangering the stability of the structure. The work of defendants and that of the stonesetters was interwoven to produce the wall and cornice. While this work was progressing, both were responsible if their joint efforts resulted in a product which falls and injures one on the street below.

[1] [See modification on page 118, infra.]

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It does not appear necessary to here apply nice distinctions in the definitions of proximate cause. However, it seems to us that the language of Chief Justice Gilfillan in Purcell v. St. Paul City Ry. Co. 48 Minn. 134, 50 N. W. 1034, 16 L.R.A. 203, applied by the jury to the facts in this case, would justify the finding that negligence in failing to brick-back and anchor the fourth stone course in the cornice was the proximate cause of Pelowski's death. "The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result." The new, independent cause claimed by defendant to have been the proximate cause of the accident, namely, the setting of the ashlar course, the jury on the evidence could very well have found inadequate to produce it, had the fourth course been properly brick-backed. See, also, Campbell v. Railway Transfer Co. 95 Minn. 375, 104 N. W. 547, and Russell v. German Fire Ins. Co. 100 Minn. 528, 111 N. W. 400, 10 L.R.A.(N.S.) 326.

Although the jury in the special finding pointed out that one physical cause for the fall of the cornice was the lack of brick-backing and anchorage for the fourth course thereof, it does not therefore necessarily follow that the proposition submitted to them in the general charge, whether the defendant assumed such position toward the stonesetters that thereby it could be guilty of negligence as to the time and manner in which the entire construction of the walls and cornice proceeded, was not also resolved in plaintiff's favor. The defendant ought not to be in a position to take advantage of rulings too favorable to it on matters affecting the duty of Lowrie & Son as to anchoring the stone veneer to the brick. Without reference to the contract, the evidence is all one way that the stonesetters provided the short anchors, and made holes and grooves for their reception in the stones, but that the bricklayers invariably set and imbedded these in the wall, so as to make a unit of the stone and brick.

From what is already said, it is apparent that we do not consider it was error for the court to refuse defendant's request to instruct the jury that it was not responsible for the manner of fitting or setting the fourth and fifth courses of cornice stone, nor in the charge that, if the negligence of both defendant and the stonesetters concurred as the

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proximate cause of Pelowski's death, a recovery could be had. No objection was made at the trial to the charge as given; but on the motion for a new trial several errors were alleged, and are urged here. Unless error in substance is found, so that we may say that, had the instruction challenged not been given, the result might have been different, it should not be held to have been prejudicial.

By the contract with the owner, the defendant Wells Brothers Company undertook to see that the construction of the building was done properly, and with the Reed Stone Company for the stonework it stipulated that the subcontractor shall sufficiently perform. furnish, and finish the work in a thorough and workmanlike manner under the direction and to the satisfaction of the general contractor and architect. Under this provision, and the one hereinbefore referred to, it may be that the trial court placed a too limited construction upon the authority of the contractor over the subcontractor; but in this defendant is not prejudiced. However, we think the contract stipulations, and the actual manner of constructing the wall and cornice by defendant and the subcontractors, justified the instruction to the effect that, if the work in the construction of the wall and cornice was done under the direction of Wells Brothers Company as to means and methods of doing it, the company must exercise ordinary care to see that the same was reasonably safe.

One instruction is criticised because it submitted to the jury whether there was negligence on the part of defendant in incorporating into the wall any defective stonesetting which caused the fall. The court could not assume that the jury might find no negligence in this regard, and, further, if it be true, as defendant claims, that the only negligent proximate cause found by the jury was the failure to incorporate the fourth cornice course of the stone into the structure, it is hard to perceive how defendant could have been prejudiced by the instruction given. The court also gave an instruction to the effect that Wells Brothers Company had engaged to erect the building for the owner, and, in so doing, to see to it that the materials used by the Reed Stone Company were suitable and proper, and that the work performed by that company was workmanlike, and if defendant negligently failed to exercise care in this respect in regard to this wall

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and cornice, and such failure was a proximate cause of Paul Pelowski's death, defendant is liable. We do not consider this instruction inapplicable to the evidence or prejudicial.

The other challenged portions of a charge eminently fair, exhaustive, and fully guarding the rights of defendant, we deem so clearly right that we shall not discuss them.

The order appealed from is affirmed.

On January 24, 1913, the following order was filed:

In the opinion an incident in regard to the temporary placing of an ashlar stone so as to endanger the wall is erroneously stated as having been observed and corrected by the superintendent of the defendant contractor, whereas it was done by the superintendent of the architect and defendant owner. The deduction to be drawn from this mistaken premise is not of sufficient materiality to change the result, or warrant a reargument of the case, and the application is therefore denied.

FRANK SMALL v. AB. SMITH and Another.[1]

December 27, 1912.

Nos. 17,788—(109).

Lien on logs — verification of statement.

Action to recover for labor and services, in cutting and banking logs, rendered to a logging contractor, and to enforce a lien therefor on certain of the logs purchased by the defendant company. *Held*:

1. It is not essential to the validity of a lien statement, required by section 3525, R. L. 1905, that it be verified by the oath of some person having personal knowledge of the facts therein stated. Krengel v. Haslam, 118 Minn. 506, followed.

2. The findings of the trial court referred to in the opinion show a substantial compliance with the statute as to setting forth the dates of beginning and ending the labor.

[1] Reported in 139 N. W. 133.

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3. A time check, issued by a contractor, or his foreman, to a laborer, containing a memorandum of the time of labor and the amount he is entitled to receive therefor, is the evidence and symbol of his claim for such labor. The indorsement in blank of such a check and a delivery thereof is an assignment in writing of the claim for labor, as required by the statute.

Action in the district court for St. Louis county against Ab. Smith and Duluth Log Company, to recover $88.41 and to foreclose a lien for services in cutting, hauling and banking certain logs. The answer of the Duluth Log Company denied that plaintiff's assignors ever performed services for it or that they had a lien upon its logs. The case was tried before Dibell, J., who made the findings and conclusions of law as stated in the opinion. From the judgment entered pursuant to the findings, Duluth Log Company appealed. Affirmed.

Baldwin & Baldwin, for appellant.

William P. Harrison, for respondent.

START, C. J.

This action was brought in the district court of the county of St. Louis against the defendant Smith, a logging contractor, to recover for manual labor and personal services in cutting, hauling, and banking certain logs and lumber, rendered to him by the plaintiff's assignors, and to establish a lien therefor on certain of the logs purchased from him by the defendant Duluth Log Company. The cause was tried by the court without a jury, and findings of fact and conclusions of law, so far as here material, were made to the effect following:

Seven different persons performed manual labor and personal services on the logs in question between October 1, 1910, and March 10, 1911, under contract therefor with the defendant Smith, who, on April 10, 1911, or within a month prior thereto, was indebted to them severally in the aggregate sum of $87.16. Thereupon he issued to each of them a memorandum of or time check for the amount he was owing to him, certifying that he had earned and was entitled to the sum specified therein. Each of such persons, after he had received his check, and prior to April 26, 1911, sold or assigned to the plaintiff the indebtedness so owing to him, and at the same time indorsed

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in blank his time check and delivered it, so indorsed, to the plaintiff. On April 26, 1911, the plaintiff made a statement or claim of lien for the aforesaid amount, in which no dates, either of the beginning or ending of labor or services by any of the assignors, were set forth. On April 27, 1911, this lien statement was filed for record in the office of the surveyor general for the Fifth lumber district of Minnesota. The plaintiff attached to such statement or claim of lien so filed and recorded the time checks so indorsed in blank and delivered to him. There were no other assignments of any of the claims of indebtedness or claims of lien. The plaintiff had no personal knowledge of the facts set forth in such lien statement at the time of the making and filing thereof, and it contains no averments of knowledge of the facts therein set forth.

The conclusions of law were that the plaintiff was entitled to judgment against the defendant Smith for $87.16, with interest, which was a lien on the logs in question, and that judgment be entered accordingly. The judgment was so entered, from which the defendant Duluth Log Company appealed.

The record presents the sole question whether the facts found by the trial court sustain its conclusions of law as to the lien on the logs. The appellant claims that they do not, for the reasons that the lien statement was not verified by a person having personal knowledge of the facts, that such statement did not set forth the dates of the beginning and ending of the labor or services performed, and that there was no proper assignment in writing of the claims. The statute applicable to these questions is R. L. 1905, § 3525, which, so far as here material, reads as follows:

* * * "The lien holder may file * * * a statement, verified by the oath of some person having knowledge of the facts, setting forth his post office address, the dates of beginning and ending the labor or service. * * * Provided, further, that any person having a claim upon logs * * * may assign the same in writing to any person, * * * and the person to whom such claim may be assigned, his agent or attorney, may make and file for record the statement for lien."

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The first claim can only be sustained by construing the statute as requiring the lien statement to be made by some person having personal knowledge of the facts, but such is not the language of the statute, which is "a statement, verified by the oath of some person having knowledge of the facts, * * * and the person to whom such claim may be assigned * * * may make and file for record the statement." The statute is a remedial one, and must be liberally construed, and, so construed, it is clear that it was not the intention of the statute to provide that the verification must be made by some person having personal knowledge of the facts; otherwise, an assignee could not verify the statement, although the statute expressly provides that he may do so. In the case of Krengel v. Haslam, 118 Minn. 506, 137 N. W. 11, it was held that a provision of R. L. 1905, § 3511, requiring a lien statement to be verified "by the oath of some person shown by such verification to have knowledge of the facts stated," does not require the verification to be made by a person having personal knowledge of the facts. Following the case cited, we hold that the statement in this case was properly verified by the assignee.

The claim that the lien statement was insufficient, for the reason that no dates of the beginning and ending the labor or service were stated therein, is based on the finding that in the statement or claim for a lien no dates either of the beginning or ending of the labor or service by any of the assignors were set forth. This finding, however, must be construed with the other findings of the trial court relevant to the question, which are to the effect that the work was performed between October 1, 1910, and March 10, 1911; that the contractor made and delivered to each of the persons performing such labor a memorandum of the time, or a time check, certifying the amount he had earned and was entitled to; that the time checks were severally indorsed in blank and delivered to the plaintiff; and, further, that he attached the time checks to his lien statement. Section 3549, R. L. 1905, provides that "in no case shall the liens given by this chapter be affected by any inaccuracy in the particulars of the lien statement; but, as against all persons except the owner of the property, the lien claimant shall be concluded by the dates therein given, showing the first and last items of his account." Construing

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the findings of fact as a whole and with reference to the statutory provisions we have quoted, we hold that the lien statement was a substantial compliance with the statute as against the defendant company, the owner of the logs.

The last contention is that the assignments of the several claims to the plaintiff were not in writing within the meaning of the statute. The time checks were not negotiable in the sense of the law merchant, but they were the evidence and symbol of the claims for labor of the several peersons therein named. The indorsement of the checks in blank and their delivery to the plaintiff constituted in legal effect an assignment in writing of the respective claims of the assignors. Citizens Bank of Monticello v. Bonnes, 76 Minn. 45, 78 N. W. 875.

It follows that the findings of fact sustain the conclusions of law.

Judgment affirmed.

AUSTRO-HUNGARIAN CONSUL v. G. A. WESTPHAL.[1]

December 27, 1912.

Nos. 17,817—(161).

Construction of revision of 1905.

In construing the provisions of the Revised Laws of 1905, the court may look to the history thereof as one of the guides to their interpretation; and, in the absence of a clear intention to change it, the law as therein written will be deemed to be the same as it was prior to the revision.

Will of alien — notice to foreign consul.

Applying this rule, where an application is made for administration upon the intestate estate of a foreigner dying in this state, the notice provided for by R. L. 1905, § 3642, should be given.

[1] Reported in 139 N. W. 300.

Note.—The authorities on the jurisdiction and power of consuls to administer on estates are collated in notes in 45 L.R.A. 496 and 37 L.R.A.(N.S.) 549.

As to what assets will give jurisdiction to appoint administrator, see note in 24 L.R.A. 684.

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Right to appointment of administrator.

Under R. L. 1905, § 3696, a foreign consul, who resides in this state and who has filed a copy of his appointment with the secretary of state, is, next after the surviving spouse or next of kin, entitled to be appointed administrator of the estate of one of his deceased nationals dying in this state, or to nominate the person to be appointed, provided that he be suitable and competent to discharge the trust, and that he apply for administration within 30 days after receiving the notice provided for by section 3642; but otherwise the statute gives him no preference whatever.

Same — quære.

Quære: Whether the "most favored nation clause" in a treaty between the United States and a foreign nation carries the benefit of a provision of a consular convention between the United States and another country, conferring upon the representatives of the parties thereto the right to administer upon the estates of their deceased nationals.

Same — treaty with Sweden — subject to state statutes.

Article 14 of the treaty between the United States and Sweden, proclaimed March 20, 1911, purports to give to the consuls of the parties thereto the right to administer upon the estates of their deceased nationals only "so far as the laws of each country will permit;" and hence any right thereby conferred upon a foreign consul, under the "favored nation clause," with respect to the administration of the estate of one of his deceased nationals dying in Minnesota, is expressly subject to the conditions imposed by the laws of this state.

Same — next of kin.

A foreign consul cannot, as such, assert the priority of right of administration conferred, by R. L. 1905, § 3696, subd. 1, upon the surviving spouse or next of kin of one of his deceased nationals.

Same — limitation of time.

R. L. 1905, § 3696, in limiting the time within which the priorities of right of administration thereby conferred must be asserted, uses the word "neglect" synonymously with "fail."

Definition of creditor.

One holding a claim for funeral expenses is a "creditor," within R. L. 1905, § 3696, subd. 2, and may apply for administration pursuant to the provisions thereof.

Appointment of creditor.

A creditor, whose claim is for funeral expenses of the deceased, may be appointed administrator of the estate of his deceased debtor, though the only assets consist of a cause of action for the wrongful death of the decedent.

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Creditor has no right of nomination.

Under R. L. 1905, § 3696, subd. 2, the probate court has no power to grant letters of administration to any one except a creditor, or to some other person interested in the administration of the estate; a creditor having no authority under such subdivision to nominate a stranger.

Foreign consul may intervene and appeal.

A foreign consul, as such, has a proper status to intervene in and to become a party to proceedings upon an application to appoint an administrator of the estate of one of his deceased nationals dying in this state, and likewise may appeal from the order of the court making the appointment.

Person without interest eligible to appointment, when.

Under R. L. 1905, § 3696, subd. 3, construed in the light of its history, interest in the administration of the estate is not essential to eligibility to appointment as administrator after the lapse of four months from the death of the deceased without application by any person so interested.

G. A. Westphal was appointed administrator of the estate of Stanislaw Lis by the probate court for Hennepin county. The facts are stated at the beginning of the opinion. From the order of appointment Hugo Silvestri, imperial and royal Austro-Hungarian consul of Chicago, who appeared in the proceedings and objected to the appointment, appealed to the district court for that county. The appeal was heard upon stipulated facts before Booth, J., who made findings and as conclusion of law affirmed the order of the probate court. From the judgment entered pursuant to the order for judgment, the consul appealed. Reversed.

Moritz Heim, for appellant.

Ernest W. Lonquist, G. A. Westphal and *Otto Kueffner,* for respondent.

Philip E. Brown, J.

Stanislaw Lis, a native and citizen of Austria, died intestate on October 14, 1911, while residing in Hennepin county, Minnesota, under circumstances giving his next of kin a claim for damages for his wrongful death; such next of kin being a widow and seven minor children, all citizens of Austria and never residents of the United States. Thereafter, on November 16, 1911, R. F. Bertch & Com-

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pany, a corporation, petitioned the probate court of Hennepin county that letters of administration be issued upon the estate to G. A. Westphal, an attorney of Minneapolis, alleging substantially the above facts, claiming that it was a creditor of "the estate" of the decedent, that the estate consisted solely of the claim for the decedent's wrongful death, and that Westphal was a suitable and competent person to administer the estate. Before the court acted on this petition, however, and on December 13, 1911, a counter petition was filed by Hugo Silvestri, the Austro-Hungarian consul, of Chicago, Illinois, within whose consular jurisdiction the state of Minnesota was at that time located. This petition asked that Moritz Heim, an attorney of St. Paul, who was alleged to be a suitable and competent person therefor, be appointed administrator of the estate. The probate court denied this petition, and granted the administration to Westphal, pursuant to the petition of R. F. Bertch & Company, and thereupon the consul appealed to the district court.

Upon such appeal the facts were agreed upon by stipulation, from which it appeared, so far as here material, in addition to the facts above set forth, that the said Westphal and Heim were both "competent" to act as administrators of the estate, nothing being said as to their suitability; that the rights of R. F. Bertch & Company as a "creditor" were based solely upon services rendered as undertaker and for burial expenses of the decedent; and that Silvestri was the Austrian consul whose consular district included the state of Minnesota. The district court found the facts substantially as above stated, and, further, that Westphal was a "competent and suitable" person to administer the estate, and that Heim was "competent," nothing being said about his "suitability." The order of the probate court, appealed from, was thereupon affirmed, and from the judgment of the district court to such effect this appeal was taken by Silvestri.

The appeal is prosecuted in this court, however, by Edgar Prochnik, the successor of Silvestri as consul for Austria-Hungary; Prochnik having, by stipulation entered into September 23, 1912, been substituted in this proceeding in the place and stead of Silvestri. From this stipulation it appears that Prochnik was not a resident of Minnesota at the time of the commencement of this proceeding in

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the probate court, but it fairly appears therefrom that at the time of his substitution herein he was a resident of St. Paul, with consular jurisdiction covering the state of Minnesota. Hereafter in the course of this opinion we shall refer to the appellant as though he had, instead of his predecessor in office, petitioned for the administration, except, of course, where the determination of any question involved may require otherwise.

The appellant made his appearance in the probate court as (a) Austrian consul, (b) as personal representative of his deceased national, (c) as the legal representative of the heirs and next of kin, who were his nationals, and were absent and not otherwise represented, and (d) as the consular guardian of the absent heirs, the same being minors; and the grounds upon which it is urged in this court that the petition of the consul should have been granted, are as follows:

1. That the Austrian consul, or his nominee, had the paramount right as such to administer the estate of his deceased national.

2. That the consul, or his nominee, as the legal representative of the widow and children, had priority of right to letters of administration upon the said estate.

3. That Heim was a more suitable person to administer the estate than the said Westphal, and that it was an abuse of discretion on the part of the court to deny letters to him and grant them to the said Westphal; and

4. That in any event the respondent, Westphal, was not entitled to letters of administration, for the reason that he was not within any of the classes of persons prescribed by law as being entitled to administration, and no facts appear of record giving the court any jurisdiction to appoint him.

We will discuss these points in the same order, except that we will consider separately the two questions involved in the appellant's first point; the same being—first, whether the appellant, as consul, had a paramount and absolute right of appointment under the statutes of this state; and, second, if not, whether, as urged by him, he had such right by virtue of any treaty between the United States and Austria.

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1. The statute which we are called upon to construe is R. L. 1905, § 3696, and at the outset we must say that we find this statute somewhat ambiguous on its face, as will appear from our subsequent discussion of the same. Wherefore we may, and must, look to its history as one of the guides to its interpretation. Manston v. McIntosh, 58 Minn. 525, 528, 60 N. W. 672, 28 L.R.A. 605; Hinckley v. Kettle River R. Co. 80 Minn. 32, 82 N. W. 1088; Loper v. State, 82 Minn. 71, 84 N. W. 650; Bender v. City of Fergus Falls, 115 Minn. 66, 131 N. W. 849; Northwestern Trust Co. v. Bradbury, 112 Minn. 76, 127 N. W. 386; Lockey v. Lockey, 112 Minn. 512, 128 N. W. 833.

And, the statute under consideration being found in a general revision, the law as therein written will be deemed to be the same as it stood prior to the revision, unless we find from the statute itself or its history a clear intention to change it. Hugo v. Miller, 50 Minn. 105, 111, 52 N. W. 381; Becklin v. Becklin, 99 Minn. 307, 311, 109 N. W. 243; Evans v. City of Redwood Falls, 103 Minn. 314, 115 N. W. 200; Schmoll v. Lucht, 106 Minn. 188, 191, 118 N. W. 555; Odegard v. Lemire, 107 Minn. 315, 317, 119 N. W. 1057; State v. Ledbeter, 111 Minn. 110, 126 N. W. 477; U. S. & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112, An. Cas. 1912A, 51; Duluth T. Ry. Co. v. City of Duluth, 113 Minn. 459, 130 N. W. 18; State v. Schmahl, 118 Minn. 319, 136 N. W. 870.

Moreover, the notes of the Revision Commission of 1905 advise us that it was not the intention of such commission to change the statutes covered by section 3696 and related sections. See Revisors' Notes, page 30, to chapter 76, where the following language is found: "Except as herein mentioned, we have retained the existing law with such combination and condensation as seemed advisable." And since the sections of the revision with which we are here concerned are not mentioned in such notes as having been changed, it would seem that the Revision Commission did not intend to change the laws which they purport to compile.

2. This rule, as to the interpretation of revisions in general and of the revision of 1905 in particular, has a direct and peculiar bearing upon the instant case, not only in connection with the determination of the question of priority of right of appointment as between

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the appellant and the respondent, but also as concerning a point of probate procedure in cases like the one before us, which point, though not directly raised herein, is so closely connected with the questions actually involved, and historically is so instructive upon the points which we are called upon to decide, that we are constrained to discuss and determine it before addressing ourselves to the matters directly presented on this appeal.

The first statutory recognition, in this state, of the rights of foreign consuls or representatives, in connection with administration upon estates of their deceased nationals, seems to have been by Laws 1871, p. 111, c. 56, amending G. S. 1866, c. 51, § 20. This act was as follows:

"When application is made to the judge of probate for the appointment of an administrator of an intestate estate, or for letters of administration with the will annexed, he shall cause notice of the same and of the time and place of hearing thereof, to be published for three successive weeks in such newspaper as he shall direct, and when such application is made by any person, not the widow, or of kin to the deceased, and the deceased was a native of any foreign country, the judge of probate shall cause such notice of the time and place of hearing such application to be served on the consul or other representative of the kingdom, state or country of which the deceased was a native, residing in the state of Minnesota, who may have filed a copy of his appointment as such consul or representative with the secretary of the state, by depositing a copy thereof in the post office, postage paid, addressed to such consul or representative, and in case the kingdom, state or country of which the deceased was a native, shall have no consul or representative in the state of Minnesota, then such notice shall be served as aforesaid on the secretary of state, and shall be by him forwarded to the representative of such kingdom, state or country at the city of Washington."

This law stood as above quoted, without change, until 1889, when it was incorporated in the Probate Court Code. Laws 1889, c. 46. Here it appeared as sections 73 [p. 110] and 317 [p. 156] the for-

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mer being in the chapter dealing with administration of estates of intestates, and the phrase "or for letters of administration with the will annexed," found in the Laws of 1871, being omitted, but otherwise being practically identical with the first part of chapter 56 of such Laws down to the portion thereof beginning "and when such application is made," etc., at which point such chapter is taken up and re-enacted word for word by section 317 of the Probate Code. This section is in chapter 20, entitled "Miscellaneous Provisions," but upon the margin of the page is found the following note, purporting to index the contents of such section: "Notice of application for letters of administration with the will annexed."

The act of 1871 next appeared in the Statutes of 1894, and here again, as in the Laws of 1889, its first, and general, provisions were separated from its second, and specific, provisions, appearing as sections 4480 and 4732, respectively; the latter section being precisely identical with section 317 of the Laws of 1889 and with the latter portion of the act of 1871, except that the word "counsel"[1] is erroneously used for the word "consul," and the section was given a caption identical with the marginal index note to section 317, above mentioned, so that, when read in connection with its caption, section 4732 of the Statutes of 1894 was limited to applications for administration with the will annexed.

Finally, section 4732 of the Statutes of 1894 was carried into Revised Laws 1905 as section 3642, and as a provision dealing only with applications for administration with the will annexed; the other, and general, portion of the act of 1871 being covered by R. L. 1905, § 3642, providing generally for notice in probate proceedings.

From this review of the statutes relating to notice to foreign representatives of applications for administration upon the estates of their deceased nationals, we can reach but one conclusion, viz., that the change of wording found in R. L. 1905, § 3642, which section was adopted precisely as reported by the Revision Commission, was caused by the marginal note to section 317 of the Probate Code of 1889; for, disregarding such note, section 317 applied to appli-

[1][This is the word which appears in the enrolled bill of the act of 1889.]

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cations for administration upon intestate estates, as well as to applications for administration with the will annexed, and certainly in reason it would seem that the notice should be given in the one case if in the other. That there was no change in the statute up to and including G. S. 1894, § 4732, is made manifest by the recurrence of the peculiar phrase "widow or of kin," which runs through all of the statutes up to the revision of 1905, where the term "next of kin" is used, instead of the term "of kin." Since, then, the notes of the Revision Commission declare, as noted in the first subdivision of this opinion [page 127, supra] that no change was intended to be made, except as therein stated, and this section is not referred to as having been changed, we conclude, applying the rule announced at the outset of this opinion, that there has been no change. We hold, therefore, that upon an application for administration upon the intestate estate of a deceased foreigner the notice prescribed by R. L. 1905, § 3642, should be given.

3. This brings us to the first question raised by the appellant's first contention, namely: Did the Austrian consul have the paramount right of appointment by virtue of our statutes? In order to answer this question intelligently it is necessary to set out the statute here applicable (R. L. § 3696) at length. It is as follows:

3696. "Who entitled to administration.—Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, and in the following order:

"1. The surviving spouse or next of kin or both, as the court may determine, or some person selected by them or either of them, provided that in any case the person so appointed shall be suitable and competent to discharge the trust.

"2. If all such persons are incompetent or unsuitable, or refuse to accept, or if the surviving spouse or next of kin, for thirty days after the death of the intestate, neglect to apply for administration, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it, or to some other person who may be interested in the administration of the estate.

"3. If none of the persons mentioned in the preceding subdivisions

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of this section shall apply for administration within four months after the death of the intestate, the same shall be granted to any suitable or competent person interested in the estate by purchase or otherwise.

"4. If the decedent was a native of any foreign country, and the surviving spouse and next of kin neglect for thirty days after his death to apply for administration, the same may be granted to the consul or other representative of the country of which the decedent was a native, residing in this state, who has filed a copy of his appointment with the secretary of state, or to such person as he may select, if suitable and competent to discharge the trust.

"5. If the person so appointed neglects for thirty days, after written notice of such appointment, under the seal of the probate court, served personally or by mail, to file the oath and bond required by law and the court, such neglect shall be deemed a refusal to serve, and the court may appoint such other person or persons as are next entitled to administer such estate. Such person may be appointed without notice."

The most conspicuous feature of this statute is its mandatory character as regards the order of appointment, and, if the five subdivisions thereof are to be taken as co-ordinate, each of them is subject to the mandate that the appointment "shall be * * * in the following order." Except as expressly provided with reference to suitability and competency, no discretion is left to the court as to the order of appointment; the use of the word "may" in subdivisions 2 to 5 being indicative merely of a discretion to appoint in the order named and subject to the conditions expressly specified.

But it will not do to accept this numerical order as the order of priority, without consideration of the new element which enters into the classification at subdivision 4, namely, the foreign nativity of the deceased. According to all rules of classification, this calls for a determination of whether subdivisions 1, 2, and 3 are to be considered as having a merely general application, and hence as being applicable only in cases where it is not specifically provided otherwise, thus leaving subdivision 4 standing as an independent provision,

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which, pro tanto, superseded the general provisions of the preceding subdivisions. It would seem that this question should be answered in the affirmative. It is very noticeable that subdivision 4 expressly relates back to and connects with subdivision 1. It says that if the decedent was a foreigner, "and the surviving spouse and next of kin neglect for thirty days after his death to apply for administration, the same may be granted," etc. These are the same words which are used in subdivision 2 to express the conditions upon which a creditor may be appointed, and it will not do to say that this places the consul and the creditor upon the same plane of priority, for such would of itself subvert the numerical order, so far as the same could be construed as indicative of the order of priority between persons coming within the classes designated by subdivisions 2 and 4.

Furthermore, the history of subdivision 4 seems to require it to be treated as an independent provision, giving the consul priority over the creditor where the deceased was a foreigner, and this conclusion becomes, we think, unquestionable, when we apply the rule, stated in the first point of this opinion, according to which the Revised Laws must be interpreted. Referring to the statutes embodied in R. L. 1905, § 3696, we find that this section, down to subdivision 4, is identical, with certain changes in the wording of subdivision 3 which we will presently notice, with Laws 1889, p. 109, c. 46, § 71, as amended by Laws 1893, p. 226, c. 116, § 7. See G. S. 1894, § 4478. Under the law as it stood in 1894, there was no special provision with regard to the right of a foreign representative to represent his deceased nationals, other than section 4732 of the Statutes of that year (section 317 of Laws 1889, above referred to in subdivision 2 of this opinion), providing that such representative should be given notice. His right to represent his deceased nationals seems to have been first conferred, so far as our statutes are concerned, by Laws 1895, p. 222, c. 98. By this act Laws 1889, p. 109, c. 46, § 71, subd. 2, which was, as we have stated, practically identical with R. L. 1905, § 3696, subd. 2, was amended so as to read as follows:

"If the widow, or next of kin, or the person selected by them, is unsuitable or incompetent, or if the widow, or next of kin neglects for

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thirty days after the death of the intestate to apply for administration, or to request that administration be granted to some other person, the same may be granted if the deceased was a native of any foreign country, to the consul or other representative of the kingdom, state or country, of which the deceased was a native, residing in the state of Minnesota, who may have filed a copy of his appointment as such consul or representative with the secretary of the state, or to such person as such consul or representative may request to have appointed, if suitable and competent to discharge the trust; but if such deceased was not a native of any foreign kingdom, state or country, or if said consul or representative shall for thirty days after notice, served as required in section three hundred and seventeen (317) of this act, neglect to apply for administration or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it, or to such other person as may be interested in the administration of the estate of the deceased."

Under this statute there certainly could be no question as to whether the foreign representative took precedence over the creditor, for the only mention of the creditor in the whole act, as thus amended, is either in express subordination to the right of the consul, if the latter be suitable and competent, where the deceased was a native of a foreign country, or upon the express condition that the deceased was not a foreigner. And thus the law stood at the date of the present revision, for the only other amendment, by Laws 1899, p. 153, c. 149, § 2, merely inserted the phrase "or surviving husband" after the word "widow," so that the law as it stood prior to 1905 may be summarized as follows, aside from questions of suitability and competency:

The widow, surviving husband, or next of kin, or some one selected by them, had the first right of appointment in all cases, for a period of 30 days from the death of the decedent.

If the decedent was not a foreigner, the creditor, or some other person interested in the estate, had the next right. But if the deceased

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was a native of a foreign country, the consul or other representative of such country was next after the widow, etc., in order of priority of right, such right being subject to loss by failure to exercise it within 30 days after the notice provided for by G. S. 1894, § 4732 (Laws 1889, p. 156, c. 46, § 317); and the creditor had no right to administer until the expiration of such 30 days.

Finally, in any case, where those entitled to priority neglected for four months from the death of the decedent to assert the same, the court could appoint "any suitable and competent person, upon application being duly made to the probate court of the proper county by any person interested in the estate of the deceased by purchase from any of the heirs of the deceased or otherwise;" this provision having been added by Laws 1893, p. 226, c. 116, § 7, and never having been changed until, by subdivision 3 of section 3696 of the revision of 1905, it was made to read so that, if literally construed, interest in the administration of the estate is essential to eligibility to appointment, even after the lapse of four months from the death of the deceased without any grant of administration.

Such was the law at the time of the present revision, and, in view of what we have already said as to the presumption against an intention on the part of either the Revision Commission or the legislature to change it, we find no difficulty in arriving at the conclusion that by R. L. 1905, § 3696, it was intended to preserve the priority of right theretofore given to consuls or other representatives of foreign countries. This section was adopted word for word from the report of the Revision Commission, except that subdivision 5 was added by the legislature. This subdivision we deem to be a new enactment, intended to provide for summary appointment after 30 days' neglect of the person appointed, pursuant to any of the previous subdivisions, to qualify. It has no bearing on the case before us.

It will at once be noticed that under the law as at present written the right of the foreign representative seems to be unlimited in point of time; but in view of the history of this provision, as above recited, and likewise in conformity with the manifest intent of the whole law on the general subject here involved, we conclude that such right

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is limited to 30 days after receiving the notice which, as we have held in subdivision 2 of this opinion, he is entitled to receive. When thus construed the law becomes clear, logical, and simple of administration. Construed in any other way, it is contradictory and almost unintelligible. Between these two courses, therefore, we cannot hesitate, especially as the construction which we have adopted would seem not only to be justified, but demanded, by the rules of statutory construction to which we have so freely adverted above.

But it does not follow that the petitioning consul in the instant case was entitled to appointment as a matter of right. As a matter of law he was not so entitled, for he was not a resident of this state. The language of the statute (subdivision 4) is that, upon the conditions recited, administration may be granted to the consul or other representative of the country of which the deceased was a native, *residing in this state,* who has filed a copy, etc., or to such person as he may select. This language is practically identical with so much of the act of 1871, and subsequent re-enactments thereof, including R. L. 1905, § 3642, the history of which we have recited in subdivision 2 of this opinion. In these statutes, relating to notice to foreign representatives, the phrase "residing in this state" manifestly qualifies "consul or other representative," as will appear from the mere reading of the statutes; and if we could doubt that such is the intent of R. L. 1905, § 3696, subd. 4, our doubt would be removed by reference to the other and prior statutes, cited above, in which the meaning is absolutely clear. We hold, therefore, that the petitioning consul, not being a resident of this state, was not entitled, as a matter of right, either to appointment himself or to nominate any other person for appointment.

4. The next question presented by the appellant's first contention, viz., that he was entitled to appointment as a matter of right, is: Does any treaty between the United States and Austria give or purport to give to Austrian consuls the absolute right to administer upon the estates of their deceased nationals dying in this country? The treaty with Austria, upon which the appellant relies, is the one which was concluded July 11, 1870, and proclaimed June 29, 1871.

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See Compilation of Treaties in Force in 1909. Article 1 of this treaty [page 39] provides:

"Consuls-general, consuls and other consular officers appointed and taking office according to the provisions of this article, in one or the other of the two countries, shall be free to exercise the right accorded them by the present convention throughout the whole of the district for which they may be respectively appointed. The said functionaries shall be admitted and recognized respectively upon presenting their credentials in accordance with the rules and formalities established in their respective countries. The exequatur required for the free exercise of their official duties shall be deliverd to them free of charge; and upon exhibiting such exequatur they shall be admitted at once and without interference by the authorities, federal or state, judicial or executive, of the ports, cities and places of their residence and district, to the enjoyment of the prerogatives reciprocally granted."

Under this provision the petitioning consul, being the Austrian representative for the district in which Minnesota was at that time included, and having filed a certified copy of his exequatur in the office of the secretary of state of this state, was entitled to exercise in Minnesota all the rights and privileges legally conferred upon him by the treaty in question; and article 8 of the treaty gave him the right to apply to the courts in the event of any infraction thereof. What, then, were his rights and privileges so conferred? The only provision thereof which can be invoked as possibly conferring any rights upon him which are here material is found in article 15 [page 44] which is as follows:

"Consuls-general, consuls, vice consuls and consular agents, also consular pupils, chancellors and consular officers shall enjoy in the two countries all the liberties, prerogatives, immunities and privileges granted to functionaries of the same class of the most favored nation."

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It is upon this "favored nation clause," which is likewise repeated in the petitioning consul's exequatur, that the appellant bases his claim here involved, invoking article 14 of the treaty with Sweden, proclaimed March 20, 1911 (37 St. 17), which is as follows:

"In case of the death of any citizen of Sweden in the United States or of any citizen of the United States in the Kingdom of Sweden without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs of the circumstances, in order that the necessary information may be immediately forwarded to parties interested. In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul-general, consul, vice consul-general, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice consul-general, or vice consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate. It is understood that when under the provisions of this article, any consul-general, consul, vice consul-general, or vice consul, or the representative of each or either, is acting as executor or administrator of the estate of one of his deceased nationals, said officer or his representative shall, in all matters connected with, relating to, or growing out of the settlement of such estates, be in such capacities as fully subject to the jurisdiction of the courts of the country wherein the estate is situated as if said officer or representative were a citizen of that country and possessed of no representative capacity whatsoever."

The benefit of this article of the treaty with Sweden being claimed by the Austrian consul by virtue of the "most favored nation clause" found in the treaty with Austria, the question at once arises, and

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is raised by the respondent, as to whether such clause can be invoked for such purpose. From the fact that the decision of this question was expressly pretermitted in the very recent case of Rocca v. Thompson, 223 U. S. 317, 334, 32 Sup. Ct. 207, 56 L. ed. 453, affirming Estate of Ghio, 157 Cal. 552, 108 Pac. 516, 37 L.R.A. (N.S) 549, 137 Am. St. 145, it would seem that the Supreme Court of the United States was in doubt on this point. However, it was held by the state court that the "favored nation clause" conferred the benefit of a stipulation giving to consular officers the right to administer upon the estates of their deceased nationals (see Estate of Ghio, supra), and such would seem to be the effect of such a clause. It is true that the benefits of the provisions of reciprocity treaties have been denied to other nations whose only claim thereto was based upon a "most favored nation" clause (see Bartram v. Robertson, 122 U. S. 116, 7 Sup. Ct. 1115, 30 L. ed. 1118; Devlin on the Treaty Power, § 131); but it seems that the courts have not deemed consular conventions, of the kind here involved, to be within the same class with reciprocity treaties (see Devlin on the Treaty Power, § 131; McEvoy v. Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. 601; In re Lobrasciano's Estate, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040; In re Scutella's Estate, 145 App. Div. 156, 129 N. Y. Supp. 20; Carpigiani v. Hall, 172 Ala. 287, 55 South. 248).

Assuming, then, that the Austrian consul was entitled to invoke the provisions of article 14 of the treaty with Sweden, the next question is whether such article purports to confer upon consular officers the right here claimed as a matter of absolute right, such as would supersede state statutes in conflict therewith. This question is of grave importance. As was said by Mr. Justice Shaw, in delivering the opinion of the Supreme Court of California, in Estate of Ghio, supra, at page 557:[1]

"The question presented would directly affect the right of administration upon the estates of all citizens of all the above named countries (whose treaties with the United States contain the most fa-

[1][37 L.R.A.(N.S.) p. 549, 108 Pac. p. 523.]

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vored nation clause) residing in this state, of whom there is doubtless a large number. It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the Federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it."

Approaching the question there presented in the spirit indicated by the above-quoted language, it was held that article 9 of the treaty between the United States and the Argentine Republic, of date July 27, 1853 (10 St. 1005), did not purport to contravene or supersede the state laws, and that under such treaty a foreign consul was not entitled, as a matter of right, to administer the estates of his deceased nationals, as against a priority of right conferred upon the administrator by the state law, which decision was affirmed, both in its conclusion and its reasoning, by the Supreme Court of the United States. See Rocca v. Thompson, supra. The provision construed in this case was as follows:

"If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

The feature of this provision which was given controlling effect, both in the state court and the Federal court, is, to quote from the opinion of the latter, that "the sole right conferred is that of intervention and that conformably with the laws of the country." The question, then, before us in the instant case, is whether the treaty

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with Sweden (article 14) confers any greater right than the provision of the treaty with the Argentine Republic above-quoted. In the Rocca case, supra, Mr. Justice Day seems to refer to the treaty with Sweden as expressly and clearly giving Swedish consuls an absolute right in the premises; but at most this was a mere dictum, and we cannot follow it without question, especially as Mr. Justice Day's use of the Swedish treaty by way of comparison with the Argentine treaty, and the language used by him in this connection, may well be referred to the fact that the treaty with Sweden expressly gives the right to be "appointed as administrator," whereas the Argentine treaty conferred only the "right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased." That article 14 of the treaty with Sweden purports to grant Swedish consuls the "right to be appointed as administrator of such estate"—that is, of the estates of their deceased nationals dying in this country—cannot be gainsaid, for so it is expressly declared, and to this extent, at least, the decision in the Rocca case is not here in point; but article 14 contains a qualification similar to that found in article 9 of the Argentine treaty, namely, "so far as the laws of each country will permit." If this clause qualifies the "right to be appointed as administrator," as well as the right, pending the grant of letters of administration, to "take charge of the property," etc., then under the decision in the Rocca case, and also upon independent reasoning, the state laws will control, though they limit the right of the consul both in point of time within which he must assert his treaty right and in the matter of residence in the state.

Grammatically it may well be contended that this qualifying clause applied only to the clause with which it is immediately coupled, thus leaving the right to administration without qualification. In view. however, of the presumption so aptly referred to by Mr. Justice Shaw in Estate of Ghio, supra, against any intention on the part of the Federal government to invade, by treaty, the province of state law, in a matter so inherently local, as distinguished from national, and likewise from a consideration of the subject matter and the provisions of this whole article, and especially the latter part, we have

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concluded that the right to appointment as administrator is conferred by such article upon the expressed condition that it can be claimed only "so far as the laws of each country will permit." It would certainly seem strange that the right to temporary possession and control until appointment of an administrator should thus be qualified, and the right to be appointed administrator be given in unqualified terms. The former is often no less important than the latter. Likewise, we cannot think, in the absence of clearly expressed intention so to do, that the Federal government intended to take the matter of administration of the estate of foreigners entirely out of the control of the states. See Lanfear v. Ritchie, 9 La. An. 96; 25 Harvard Law Rev. 735.

Holding, as we do, that the treaty right here invoked is, by its own terms, subject to state control, we are not called upon to determine whether the Federal government could, by treaty, confer an absolute right upon foreign consuls to administer upon the estates of their deceased nationals, anything in the state laws to the contrary notwithstanding.

5. The appellant's second point, like his first, comprises two contentions, viz.: (a) That under the law of nations he represented the widow and minor children of the decedent, who were all nonresident aliens, to the same extent as though he had held their express power of attorney; and (b) that as such representative he had the right to be appointed administrator, or to nominate the appointee, provided only that he should assert such right by proper application prior to the actual appointment of some one else, or has not been guilty of unreasonable "neglect," it being argued in this connection that the mere failure of the surviving spouse or next of kin to apply within 30 days is not equivalent to "neglect" to so apply.

In considering this point, we will assume that the petitioning consul had the right, as consul, to appear for and represent his nonresident nationals in the proceedings here involved; but we cannot agree that, without some express appointment, he can be considered either as their nominee or as entitled to assert their right to priority, so as to dispense with an application by them for administration. Nor do we think that the statute uses the word "neglect" in any

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sense other than as synonymous with "fail." The uncertainty as to the date when the priorities provided for by the statute would expire, if the word "neglect" were construed as contended for by the appellant, would involve the application of the statute in utmost confusion, and no such intention can be attributed to the legislature.

6. The appellant's third point is that the trial court abused its discretion, and failed to choose, as between the two applicants for appointment, the one most suitable to discharge the trust. All that need be said in this regard is that we cannot, upon the record before us, say that such was the case. See Hanson v. Nygaard, 105 Minn. 30, 35, 117 N. W. 235, 127 Am. St. 523.

7. The appellant's fourth contention is that the respondent is not within any of the classes of persons prescribed by law as entitled to administer, and that no facts appear of record authorizing his appointment. The grounds of this contention are:

(a) That R. F. Bertch & Co., the petitioner upon whose application the respondent was appointed, is not a creditor of the deceased, but of the estate, and that neither did it come within the designation of "some other person who may be interested in the administration of the estate."

(b) That since no authorized person requested it to bury the deceased, it could not claim to be even a creditor of the estate, and that therefore the petitioner could at best claim only as a person interested "by purchase or otherwise," within subdivision 3 of section 3696, which could be done only after the expiration of four months from the death of the deceased.

(c) That since practically all the assets consisted of a claim for the wrongful death of the deceased, no one but the heirs had the right to assert such claim, and that, they having failed to do so, there was nothing which a stranger could administer upon; and finally

(d) That in any event the respondent, Westphal, was not within any of the classes designated by the statute, and did not claim as such, but only as the nominee of R. F. Bertch & Co., and that the statute does not give a creditor the right to nominate anyone else to be appointed, as is given the surviving spouse or next of kin, and to foreign consuls when the deceased was a foreigner.

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Taking up these grounds in the order presented, we hold that grounds (a) and (b) cannot be sustained. There is some conflict of authority as to whether one holding a claim for funeral expenses is a "creditor," within the meaning of a statute giving "creditors" a right to administer upon the estates of their deceased debtors (see 11 Am. & Eng. Enc. [2d ed.] 773; 18 Cyc. 90; Hildebrand v. Kinney, 172 Ind. 447, 87 N. E. 832, 19 An. Cas. 788); but we think that the better and sounder rule is to regard such a person as a creditor. R. L. 1905, § 3745, gives funeral expenses priority of payment over all other "debts against the decedent;" and we fail to see why the holder of such a claim should not be held to be a creditor within the meaning of section 3696, subd. 2.

Nor can we hold with the appellant upon ground (c). It is true that the action for death is for the benefit of the surviving spouse and next of kin, and may be settled or released by them, so as to bar a subsequent action by the administrator. Foot v. Great Northern Ry. Co. 81 Minn. 493, 84 N. W. 342, 52 L.R.A. 354, 83 Am. St. 395; Sykora v. Case T. M. Co. 59 Minn. 130, 60 N. W. 1008. But it is also true that the right of action is in the personal representative (see R. L. 1905, § 4503; Hutchins v. St. Paul M. & M Ry. Co. 44 Minn. 5, 46 N. W. 79; Foot v. Great Northern Ry. Co. supra), and that he may settle or compromise, even without the consent of the surviving spouse or next of kin (Foot v. Great Northern Ry. Co. supra). A cause of action for the death of the decedent constitutes sufficient assets to authorize the appointment of an administrator (Hutchins v. St. Paul, M. & M. Ry. Co. supra), and we think that a creditor whose claim is for funeral expenses may have administration for the purpose of enforcing the cause of action for death, especially in view of the requirement of section 4503 that funeral expenses shall be deducted from the recovery as being the first charge thereon. See Lahti v. Oliver Iron Min. Co. 106 Minn. 241, 118 N. W. 1018; Swift & Co. v. Johnson, 71 C. C. A. 619, 138 Fed. 867, 1 L.R.A.(N.S.) 1161.

This brings us to a ground which we must sustain. The appellee, Westphal, did not claim the appointment in his own right as a person interested in the administration of the estate in any manner

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whatsoever. His sole right to appointment, or rather his sole status to be appointed, is that he is the nominee of R. F. Bertch & Co., and was found by the court to be competent and suitable. But the statute gives creditors no power of nomination, and the express grant of such power to members of classes designated by subdivisions 1 and 4 of section 3696 would seem to exclude any such implied power in the creditor, to whom no such power is expressly granted. After an exhaustive examination of authorities from many other states, we find that it is the general policy of most of the states to give administration of intestate estates first to persons interested in the estates, upon the presumption that such persons will be most likely to conserve the assets for their own benefit and for that of all other persons who may be entitled to share therein, and that in the absence of express power of nomination the right so given is personal and nondelegable. See 11 Am. & Eng. Enc. (2d ed.) 778; 18 Cyc. 92. And it appears to us that our statute embodies and declares this policy. Again, if a creditor has the right to nominate some one else, or if the court, on the creditor's petition, has the power to appoint a stranger, subdivision 3 of the section under consideration would be rendered useless, in the discretion of the trial court, whenever it chose to appoint a stranger at the instance of a creditor. In Estate of Daggett, 15 Idaho, 504, 98 Pac. 849, the point here under consideration was decided in accordance with the conclusion which we have announced. Said the court at page 508:

"The language itself of section 5351 convinces us that appellant's contention is untenable. Subdivision 1 designates the persons first entitled to administer, namely: 'The surviving husband or wife, or some competent person whom he or she may request to have appointed.' It will be noticed that the language composing the latter part of this subdivision is not found in connection with any of the other ten subdivisions. In other words, the statute itself specifically authorizes a husband or wife, by designation and request, to advance any competent person to his or her own rank; but it does not authorize any one of any of the other classes, by request or otherwise, to advance a person to his or her rank. If the expression 'or some

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competent person whom he or she may request to have appointed' had been intended to apply to each of the eleven subdivisions, that language would have been placed in the body of the section preceding the subdivisions, in which case it would have applied to all th subdivisions."

If it should be urged that in the instant case there are no other persons interested than those represented on this appeal, the answer would be that this case can be determined only under the law as applicable to all cases, and the error in appointing the respondent, Westphal, lies in the lack of power of the court to appoint a stranger at the time this appointment was made. It is true that in some states a power to appoint by virtue of a general equitable jurisdiction is recognized, in addition to the power conferred by statute. See Hildebrand v. Kinney, 172 Ind. 447, 87 N. E. 832, 19 An. Cas. 788, and cases therein cited. But certainly, we think, this power, if it exists in this state, should not, and, indeed, cannot, be exercised until the limits prescribed by the several subdivisions of section 3696 have expired; for otherwise the statute would be emasculated, if not virtually wiped out.

That the appellant, though not himself entitled to appointment or to nominate the appointee, as a matter of right has a proper status as a party to this proceeding, both below and here, cannot be doubted. As consul, it is his duty and right to protect the interests of his nationals, and to appear in proceedings concerning those rights; and, having an interest to safeguard, he has a status as party and to appeal, though not himself entitled of right to be appointed. Butcher v. Kunst, 65 W. Va. 384, 64 S. E. 967.

8. In holding that the respondent, Westphal, had no status to be appointed administrator of the estate of Stanislaw Lis, we do not mean to hold, or even to intimate, that on a new trial of this proceeding the trial court will, of necessity, be compelled to appoint the appellant, Edgar Prochnik, though he is the Austrian consul "residing in this state;" for the petitioning consul, Hugo Silvestri, was the Austrian representative for the district in which the state of Minnesota was included at the time of the application by R. F. Bertch &

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Co., and as such representative he intervened in the proceeding, thus curing any irregularity due to the failure to give the notice which, as we have held in subdivision 2 of this opinion, should be given upon an application for the appointment of an administrator for the intestate estate of a deceased foreigner, and, furthermore, since such intervention was filed, thus showing that such representative had actual notice, the time during which a resident consul would have had priority has expired. And since, likewise, four months have elapsed since the death of the deceased without application for appointment by any of the persons given priority by subdivisions 1 and 2 of section 3696, the case is now controlled by subdivision 3. As this section now reads, it requires, if literally interpreted, that the person appointed must be "interested in the estate by purchase or otherwise;" but we cannot think that such is the law. Subdivision 3 was introduced into the statute by Laws 1893, p. 226, c. 116, § 7, and was carried verbatim into the Statutes of 1894 as subdivision 3 of section 4478. It was as follows:

"If none of the persons mentioned in the preceding subdivision of this section apply for administration as therein provided within four months after the death of the intestate, the same shall be granted to any suitable and competent person, upon application being duly made to the probate court of the proper county, by any person interested in the estate of the deceased by purchase from any of the heirs of the deceased, or otherwise."

The purpose of this provision is manifest. As the law stood before its adoption, the court was without power to appoint a stranger, even if all of the persons interested were unsuitable and incompetent, or refused to accept the appointment, and this provision was adopted to remedy the shortcomings of the statute in this regard. Under subdivision 2, both before and after the present revision, the court could, after 30 days, appoint a creditor or any other person "interested in the administration of the estate;" and hence there was, and still is, no necessity for subdivision 3, if taken literally as at present written. But if this subdivision is taken as it stood prior

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to the revision, it fills a very important place in the law, which otherwise would be incomplete, and might at times prevent any administration of an estate at all. Under the rule of interpretation announced in subdivision 1 of this opinion, and applied in subdivisions 2 and 3, we hold that subdivision 3 must be read as it stood prior to the revision. Upon the retrial of this case, therefore, it will be for the trial court, in the exercise of its discretion, to appoint any "suitable and competent" person as administrator of Stanislaw Lis.

Judgment reversed.

STATE v. CHARLES A. LINDBERG and Another.[1]

December 27, 1912.

Nos. 17,045—(6).

Collateral attack upon ditch proceedings.

The rule that parties to ditch proceedings cannot, after completion of the proceedings and the construction of the ditch, be heard to attack the validity of the proceedings in a collateral action, followed and applied.

Entry of judgment invalid.

A landowner, whose land had been assessed for benefits from the construction of a drainage ditch, failed to pay the assessment, and the amount thereof was entered upon the delinquent tax list for collection as required by the drainage statute. He appeared in that proceeding and interposed in defense the invalidity of the ditch proceedings. The court sustained the defense and directed the entry of judgment discharging the land from the assessment. The clerk of the court, upon the same paper and at the end of the findings and order of the court, made the entry, "Judgment is hereby entered in accordance with the foregoing." No formal judgment was entered. It is *held:* (1) That this entry did not constitute a valid judgment within the requirements of the statutes upon the subject of judgments in delinquent tax proceedings; and (2) that it did not preclude the right of the court, after the expiration of the time for appeal from judgments properly entered, from entertaining and granting an application for amended findings.

[1] Reported in 139 N. W. 286.

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Amended findings sustained by evidence.

The amended findings *held* sustained by the evidence.

No estoppel by county attorney's admission.

An admission by the county attorney, express or implied, of the validity of the judgment so attempted to be entered by the clerk, *held* not to estop the state or the county.

In the matter of proceedings in the district court for Morrison county to collect real estate taxes delinquent in January, 1909, plaintiff obtained an order upon defendants, as executors of the last will and testament of Howard P. Bell, deceased, to show cause why the judgment entered therein should not be set aside and the findings amended in accordance with the facts and the evidence. The order to show cause was heard by Taylor, J., who made findings and as conclusion of law found that the judgment should be entered in the form provided by statute against the respective parcels of land mentioned in the proceeding. From the judgment entered against specified parcels of land, the executors appealed. Affirmed.

E. P. Adams, for appellants.

D. M. Cameron, for respondent.

Brown, J.

On July 15, 1903, a petition in due form was presented to the board of county commissioners of Morrison county, praying for the construction of a drainage ditch through lands described therein. Such proceedings were thereafter had by and before the board, whether regular or irregular is not here important, that on March 7, 1904, an order was duly entered by the board granting the prayer of the petition, confirming the report of the viewers, and establishing and directing the construction of the ditch. The ditch was thereafter constructed in accordance with the prayer of the petition and the order of the board, assessment of damages and benefits made and approved, and a statement and report thereof filed with the county auditor in compliance with the drainage statute. Howard P. Bell was one of the petitioners for the ditch, and certain land owned by him and affected thereby was assessed for benefits to accrue from

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its construction. An instalment of the assessment so made against the Bell land, falling due in 1907, was not paid, and the same was by the county auditor entered upon the delinquent tax list for the year 1909. Prior to this time Bell died, and appellants herein, C. A. Lindberg and L. W. Lindblom, were appointed and subsequently duly qualified as executors of his last will and testament.

In proper season the executors duly appeared in the tax proceedings, and interposed an answer therein, setting up the alleged invalidity of the drainage proceedings, that the assessment made therein against the land in question was null and void, and demanding that the same be discharged as a lien against the land. The tax proceedings came before the court at the September, 1909, general term, and the defense so interposed was duly heard. Thereafter, on January 11, 1910, the court made its findings and decision, sustaining the defense, thereby holding that the assessment was invalid, and directing judgment for the general taxes, excluding therefrom the drainage assessment. The findings and decision of the court concluded with the words, "Let judgment be entered accordingly." Upon the same paper, and at the end thereof, the clerk of the district court entered the words, "Judgment is hereby entered in accordance with the foregoing." No formal judgment was then entered in the regular judgment book, or in accordance with the statutes on the subject of tax judgments; and unless the entry above quoted amounted to a judgment as a matter of law, none was ever entered pursuant to the order of the court until the 13th day of April, 1912, when it was entered by the clerk in proper form.

On April 15, 1912, the state, through the county attorney, applied for and obtained from the court an order to show cause why the judgment so entered "should not be reopened and the findings therein amended in accordance with the facts and evidence" in the case. The order was duly served upon appellants, and after hearing thereon and due consideration the court made amended findings and conclusions of law, and thereby directed and ordered the entry of judgment for the amount of the ditch assessment. The amended findings were to the effect that the proceedings for the establishment of the ditch were irregular and fatally defective, had objection thereto

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been made in proper time and in proper manner; that the ditch petitioned for and ordered constructed was in fact constructed and completed prior to the time of the levy of the assessment complained of; that no objection to the construction of the ditch was ever made by any person, prior to the filing of appellant's answer in the tax proceedings; and that Bell, whom appellants represent as executors, was one of the petitioners for the ditch. The amended conclusions of law were that judgment should be entered for the amount of the assessment. This was the reverse of the conclusion reached on the first trial. The former decision was, however, rendered prior to the decision of this court in State v. Johnson, 111 Minn. 255, 126 N. W. 1074. Judgment was thereafter entered in due form, and the executors appealed.

1. It is well settled by our decisions that the validity of drainage proceedings, commenced and concluded under the drainage statutes, cannot be called in question in a collateral action by any person who was a party to and who took part in the proceedings; that as to such persons the order establishing the ditch is final and conclusive, unless the validity thereof be brought in question by some direct proceeding. State v. Johnson, 111 Minn. 255, 126 N. W. 1074; State v. Tuck, 112 Minn. 493, 128 N. W. 823; Slingerland v. Conn, 113 Minn. 214, 129 N. W. 376, and cases there cited. It is also settled law in this state that a person who stands by and permits the improvement of his land by the construction of such a ditch, raising no objection to the regularity or sufficiency of the proceedings, and knowing that the cost of construction must be paid by assessment against benefited lands, cannot be heard subsequently to call in question the validity of the proceedings by means of which his property received the benefit of drainage. Geib v. County of Morrison, 119 Minn. 261, 138 N. W. 24.

In the case at bar the precise grounds, or the particular defects, made the basis of the amended findings, to the effect that the drainage proceedings were fatally defective had seasonable objection been made, are not disclosed by the findings, and there was no request for additional findings upon the question. We assume, therefore, since the statutes confer upon the board of county commissioners

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jurisdiction of the subject-matter, that the proceedings were held defective by reason of the failure to follow the requirements of the statutes in some substantial respect. And we assume, also, that the defects, whatever they may have been, were of a character which, as to Bell, a petitioner for the ditch, should have been called in question in those proceedings. Upon that basis the court was clearly right in holding that the defects were not available to the executors of Bell in the tax proceedings. That view is supported by the decisions referred to, and the findings clearly bring the case within the rule. Bell was a petitioner for the ditch, and it was constructed for the purpose of improving lands affected thereby, including those owned by him. He therefore is in no position to attack, in this collateral way, the validity of the drainage proceedings.

The reasons for the rule so applied are obvious. It would result in a palpable wrong to permit those who are parties to and interested in such proceedings, particularly the petitioners, who have charge and control of the proceedings, silently to permit them to proceed to completion, including the construction of the ditch, and be heard to complain, when called upon to pay the assessments made against them, that the proceedings were irregular, defective, and void. A rule which would sanction and approve of such a course by those who have control of the proceeding might encourage a failure of compliance with the statute in some respects essential to the jurisdiction of the board, for thereby those benefited by the final construction of the ditch could escape payment of the expense of improving their property, and cast it as a general county charge upon taxpayers who received no benefit at all.

2. It is further contended that a judgment was entered by the clerk, pursuant to the first decision of the court, holding that the assessment was invalid, and that, since the time for appeal therefrom had long since expired when the application for the amended findings was made, the judgment was final, and the court below was without jurisdiction to entertain the application, or to reopen the case for the purpose of making additional or amended findings. We do not sustain this contention.

The claim that a judgment was entered pursuant to the first de-

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cision is founded upon the entry made by the clerk at the end of the findings in the language heretofore referred to, namely:

"Judgment is hereby entered in accordance with the foregoing.
"January 13, 1910.

"S. P. BRICK,
"Clerk of District Court."

Some doubt seems to have been entertained as to the sufficiency of this entry to constitute a final judgment of the court, and on April 13, 1912, a more formal judgment was entered.

The question presented is whether the informal entry of the clerk, having remained undisturbed for more than a year, finally ended the case and precluded the court from thereafter making additional findings and ordering the entry of another judgment at variance with the first decision. We need not consider the question whether such an entry in an ordinary action at law would or would not amount to a judgment, which would become at the expiration of the time for appeal final and free from attack; for the sufficiency of this entry as a judgment must be determined from the viewpoint of the statutory requirements controlling the proceeding in which the decision of the court was made, namely, the statutes providing for the collection of delinquent taxes.

It has always been the rule in this and other states that such statutes must be strictly complied with, and any substantial, and often unsubstantial, departure therefrom invalidates the whole proceeding. Section 916 et seq., R. L. 1905, prescribes a form for judgments in such proceedings, and no claim can be made that the informal entry of the clerk was a substantial or other compliance with the requirements thereof. If the officers charged with the duties pertaining to the enforcement of delinquent real property taxes had proceeded upon the theory that this entry by the clerk constituted a valid judgment, and had caused the property of Bell to be sold in the tax proceedings, it is clear that the title acquired thereunder would have been wholly invalid, because of the fact that no proper judgment had ever been entered. Stanton v. Davidson, 109 Minn.

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510, 124 N. W. 244. It is also clear that the entry in question cannot be held valid as a judgment for one purpose and invalid for another and different purpose. The statutes referred to apply to all tax judgments, whether entered upon default of the landowner to appear and answer, or after trial and determination of defenses interposed. We therefore hold that the entry of the clerk did not amount to a judgment, and that the trial court was entirely right in entertaining the application for amended findings.

3. The further points made by appellants do not require extended discussion. The trial court had authority to make the additional findings, though they were not expressly asked for in the motion attached to the order to show cause. The matter came before the court on the order to show cause, and fully vested in the court the power to make such additional findings as the record before it and the law of the case justified. The amended findings are supported by the record. The error in the description of the ditch was an obvious mistake, and it sufficiently appears that the ditch was in fact constructed at the point desired by the petitioners.

4. It further appears that, subsequent to the first decision of the court below in the tax proceedings, the executors brought an action in the district court to set aside all instalments of the assessment against the Bell land not involved in that proceeding, in which action the county attorney appeared and interposed an answer. An admission of the validity of the clerk's entry as a judgment may be found in the answer, and by the conduct of the county attorney in that action. But such an admission, whether express or implied, was not binding upon the state, or the county, the agency of the state through which the drainage project was conducted, and no estoppel arises therefrom. 1 Dunnell, Minn. Dig. § 3211. The alleged admission of the county attorney is not, however, clearly shown; but we predicate our decision on the rule that public officers cannot bind the state by acts which, as to individuals, might constitute an estoppel. State v. Foster, 104 Minn. 408, 116 N. W. 826; Board of County Commissioners v. Dickey, 86 Minn. 331, 90 N. W. 775.

This covers all questions requiring special mention. We discover no reversible error in the record.

Judgment affirmed.

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HUGH P. GASTON v. KENNETH MAY and Others.[1]

December 27, 1912.

Nos. 17,976—(87).

Ejectment — adverse possession — findings.

Action of ejectment to recover possession of land of which, the complaint alleged, the plaintiff's intestate died seised. The answer alleged title in one of the defendants, under whom the others claimed, by adverse possession. Evidence as to such adverse possession considered, and *held*, that the finding of the trial court to the effect that the intestate died seised of the land is not sustained by the evidence.

Action in the district court for Washington county by the administrator of the estate of William K. Gaston, deceased, to recover possession of certain premises. The case was tried before Stolberg, J., who made findings and as conclusion of law found that at the time of his death William K. Gaston was the owner of the premises and that plaintiffs were entitled to the possession thereof. From an order denying defendants' motion for a new trial, they appealed. Reversed and new trial granted.

Manwaring & Sullivan and *J. C. Nethaway*, for appellants.

Daniel W. Doty, for respondent.

START, C. J.

This action was brought in the district court of the county of Washington to recover from the defendants the possession of lot 4 of section 23, in township 31, range 20. The complaint alleged that plaintiff's intestate was the owner of the land in fee at the time of his death, and that the defendants were in possession thereof and wrongfully withheld it from the plaintiff. The answer of the defendant May denied that the plaintiff's intestate died seised of the land, and alleged title thereto in himself by adverse possession thereof, by virtue of a tax deed therefor, and also asserted a lien upon the land for

[1] Reported in 138 N. W. 1025.

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taxes paid, in case his title for any reason failed. The reply put in issue the affirmative allegations of the answer, and alleged that the rental value of the land during the time it was occupied by the defendant May equaled the amount of the taxes paid.

The case was tried by the court without a jury, and findings of fact and conclusions of law were made to the effect that the plaintiff's intestate died seised of the land, and that the plaintiff have judgment for possession thereof, and that none of the defendants has any title or right to or in the same. The defendants made a motion for a new trial, on the ground that the trial court erred in its finding of fact as to the ownership of the land, for the reason that it is not sustained by the evidence, and on the ground of newly discovered evidence. The motion was denied, and the defendants appealed from the order denying it.

The controlling question presented by the record for our decision is whether the finding as to the ownership of the land, eliminating all questions as to the validity of the tax deed, is sustained by the evidence. The question involves a consideration of the evidence as to the defendants' adverse possession.

The evidence, which is practically undisputed, establishes the evidentiary facts following: A patent for the land was issued by the United States to Henry McKenty, who, on September 18, 1858, conveyed the land to Angelina G. Wadge, who, on June 21, 1887, executed a deed purporting to convey the land to William K. Gaston, the plaintiff's intestate. He never recorded his deed, but it was recorded after his death, and on December 18, 1908. No taxes on the land were ever paid by any of the holders of the record title since 1858. The land was sold for the taxes thereon for 1859 to 1871, and a tax deed purporting to convey the land was made to Morgan May on September 17, 1872, and recorded on that day. He and those claiming under him paid annually all the taxes thereon from 1872 until 1908, when this action was commenced. When May got his tax deed, he owned land on three sides of the land in question. There was a tamarack swamp and a cranberry marsh on part of the land, and the rest of it was better adapted for pasture than for cultivation. Morgan May and those claiming under him, after he received and

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recorded his tax deed, pastured the land, controlled the cranberry crops thereon, by permitting parties to gather them on shares, and cut fence posts thereon from time to time. In the latter part of August, 1888, 25 acres of the land was inclosed with a fence, which was kept up until April 1, 1903, or for 14 years and 7 months. The land was used by Morgan May and his tenants as a pasture. The land was not actually inclosed by a fence between April 1, 1903, and the year 1907, nearly all of the fence having been removed on the first-named date; but a portion of the fence posts remained standing during this time, and Morgan May and those claiming under him continued to pay each year the taxes on the land. Other than this, there is no evidence that there was any abandonment of the possession of the land when the fence was removed. On June 5, 1905, Morgan May conveyed the land by quitclaim deed to his son, the defendant Kenneth May, who, in the year 1906, granted permission to his co-defendants to erect a summer cottage on the land. They did so, and have ever since occupied it.

The law applicable to the evidentiary facts is well settled. Adverse possession of land may be shown by a variety of acts, depending on its location, nature, and beneficial uses to which it may be reasonably applied; but they must be such as clearly to indicate that a permanent occupation and appropriation of the land in hostility to the true owner is intended. There may be, in exceptional cases, adverse possession without either buildings, fences, or actual residence on the land. Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442; Holmgren v. Isaacson, 104 Minn. 84, 116 N. W. 205. A careful consideration of the undisputed evidence, and the evidentiary facts which they prove, have led us to the conclusion that the preponderance of the evidence is so manifestly against the court's finding to the effect that plaintiff's intestate died seised of the land in question that there must be a new trial, on the ground that the finding is not sustained by the evidence.

We do not deem it necessary to discuss the evidence in detail. It shows beyond a reasonable controversy that the holders of the record title of the land never paid a dollar for taxes thereon for some 50

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years, and that the holder of the tax title and those claiming under him annually paid the taxes during that time, which clearly indicates that he in good faith believed and claimed that he owned the land, and, further, that for 14 years and 7 months the land was inclosed by a fence, and so used as concededly to constitute adverse possession during the time stated. The mere fact that the fence was then removed, leaving the posts intact, does not justify the inference that the continuity of the adverse possession was interrupted. It is unnecessary to discuss or decide the question as to the validity of the tax deed.

Order reversed, and new trial granted.

BUTLER BROTHERS v. AMERICAN FIDELITY CO.[1]

January 3, 1913.

No. 17,730—(92).

Accident not due to failure of insured to comply with statute.

In this action to recover from the insurer in a liability insurance contract the amount paid by the insured in the settlement of an action brought against him, made after the insurer had denied liability under the contract and refused to defend the action, it is *held* the accident was not caused by "the failure of the insured to observe any statute affecting the safety of persons," was covered by the contract, and the insurer, in denying liability and refusing to defend the action after notice, breached the contract.

Notice of second action to insurer.

It was not necessary to notify the insurer of a second action brought for the same cause after the voluntary dismissal of the first action, where the insurer was notified of the first action, but denied liability, and refused to defend the same.

Insurer's refusal to defend a waiver of condition in policy.

By its denial of liability and refusal to settle or defend the action, the insurer released the insured from its agreement not to settle a claim without the consent of the insurer, and waived the condition of the contract making a

[1] Reported in 139 N. W. 355.

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judgment after trial of the issue a condition precedent to a recovery by the insured under the contract.

Recovery of amount paid in settlement.

Where the insurer has agreed to settle or defend an action brought to recover of the insured for an accident covered by the policy, and has wrongfully refused to so settle or defend the action, and the insured defends the same and in good faith makes a settlement thereof, he may recover the amount paid on such settlement, unless it is shown that there was in fact no liability, or that the amount paid was excessive. The settlement is presumptive evidence that there was a liability and as to the amount thereof.

Liability of insured not in issue.

The record in this case considered, and *held* to show that the question of the insured's liability in the case settled was not an issue under the pleadings, that such issue was not tried by consent, and that it was not shown by the evidence that the insured was not liable for the accident, or that the amount paid in the settlement thereof was excessive.

Admission of evidence.

There was no prejudicial error in the admission of certain evidence.

Action in the district court for St. Louis county to recover $1,518.95 on a policy of liability insurance. The facts found by the trial court are stated in the opinion. The answer, among other matters, alleged that at a point on the highway in the Village of Buhl plaintiff had placed and maintained a large quantity of rock on and over the highway, and it did thereby and otherwise obstruct the highway and make it unsafe and dangerous to use or approach; that the accident mentioned in the opinion was caused by the failure of plaintiff to observe the laws and statutes of the state affecting the safety of persons, and certain local ordinances of the village of Buhl; that no action mentioned in the complaint was brought against plaintiff for damages on account of any accident covered by the policy of insurance; that plaintiff never delivered to defendant or any of its agents a copy of the summons or complaint in the second action mentioned in the opinion; that no action mentioned in the complaint was tried or prosecuted to final adjustment upon or after trial of any issue thereof, nor was any judgment entered in any such action after trial of the issue, nor did plaintiff ever pay any money or incur any expense in any action after trial of the issue, nor in satisfaction of

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a final judgment of any action mentioned in the complaint after a trial of the issue thereof. The case was tried before Ensign, J., who made findings and as conclusion of law found in favor of plaintiff for $1,350 and $168.95, with interest. From an order denying denying defendant's motion for a new trial, it appealed. Affirmed.

Kerr & Fowler, for appellant.

Theo. Hollister, Frank Hicks and *J. A. P. Neal,* for respondent.

BUNN, J.

This action was brought to recover on a policy of liability insurance issued by defendant to plaintiff. The case was tried by the court without a jury, and resulted in a decision in favor of plaintiff. This appeal is by defendant from an order denying its motion for a new trial.

The facts are not in controversy, and are as follows: Plaintiff, in June, 1909, was engaged under contract in the work of stripping the overburden from an ore body at the Grant mine in the vicinity of the village of Buhl, St. Louis county. On June 10 defendant issued to plaintiff a "contractors' public liability policy," by which defendant agreed to "indemnify the insured against loss from the liability imposed by law for damages on account of bodily injuries, including death accidentally suffered while this policy is in force by any person or persons, not employed by the insured, during the prosecution of and while at or about the work of the insured described in the application." The policy contained a condition that it did not cover loss or expense for injuries or death "caused by reason of the failure of the insured to observe any statute affecting the safety of persons." It also provided that upon the occurrence of an accident the insured shall give immediate written notice thereof, with full particulars, to the company, and like notice, with full particulars, in case of a claim made on account of the accident. The policy also contained the following conditions:

"Condition 4: If thereafter any suit or legal proceedings are instituted against the insured, even if groundless, for damages on ac-

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count of an accident covered by this policy, the insured shall immediately cause to be delivered to the company's home office, or to the agent by whom this policy has been countersigned, every summons, notice, document, or other process served on him in such suit or legal proceedings, and upon the receipt of such summons, notice, document, or other process the company will either settle and discharge said suit or legal proceedings against the insured, or will at its own cost and in the name of the insured defend the same.

"Condition 5: The insured may provide at the company's expense at the time of the accident such immediate surgical relief as is imperative; but the insured shall not assume any liability, nor shall he, without the written consent of the company previously given, incur any other expense, settle any claim, or interfere in any negotiations for a settlement. Whenever requested by the company, the insured shall render every assistance and give all information material to the interests of the company.

"Condition 6: No action shall lie against the company to recover under this policy unless it shall be brought by the insured for loss or expense actually sustained and paid in money by the insured in satisfaction of a final judgment after trial of the issue, nor unless such action is brought within ninety days after such final judgment has been so paid and satisfied."

During the course of its work in stripping the mine, plaintiff laid dump tracks upon an embankment from 8 to 12 feet wide across a public highway in the village of Buhl, and had extended the embankment and tracks some 600 feet beyond and to the south of the highway. The highway to the west of where it was crossed by the tracks extended over a low and swampy piece of ground for several hundred feet. In times of high water this highway had been more or less covered with water, but not to an extent to prevent travel over the same, except for about a week preceding the 13th of August, 1909. When the low ground west of the embankment, prior to the time the embankment was constructed, was flooded to a considerable depth, the excess water would find an outlet; but after the embankment was constructed the flow of this excess water was more or less

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obstructed. Within a week prior to August 13 an unusual amount of rain fell, amounting to a cloudburst. Thereby the highway for several hundred feet west of the embankment was flooded to a depth of more than 5 feet at the deepest place; the water being shallow as it was reached traveling the highway from the west, and gradually increasing in depth. Prior to the time the highway was so flooded, plaintiff had constructed a passable roadway leading from a point where one of the dump tracks crossed the highway east of the low ground, extending around the same to the south, and connecting with the highway again. Plaintiff placed a cedar log across the original highway, where it was joined by the new road at the westerly end. The portion of the original highway thus cut off by the embankment at one end and the log at the other end was about 600 feet in length, and was partially submerged by water on August 13.

On August 13, between 6 and 7 o'clock P. M., August Vaatanen, driving a horse and delivery wagon along the highway from the west, came to the log placed across the same, drove over it, continued on the road until the pond of water was reached, and kept on until the water was about 5 feet in depth, where his horse was drowned. Vaatanen attempted to reach dry ground by swimming, but died in the attempt from heart failure due to fright and excitement. In November, 1910, an action was brought by the administrator of Vaatanen's estate against the plaintiff in this action to recover damages for his death. Butler Brothers, defendant in that action, plaintiff in this, immediately notified the insurance company of the commencement of the action, delivered to it the summons and complaint, and demanded that it defend the action, under the terms of its policy of insurance. The company, before the time to answer expired, returned the summons and complaint, and repudiated all liability under the policy, alleging as its ground of repudiation that it had learned from investigation that the insured had violated the provisions of subdivision 4 of condition 2, in that the accident was caused by its failure to observe a "statute affecting the safety of persons."

After this denial of liability, the insured, at its own cost, employed counsel and prepared to defend the action. Thereafter the action

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was dismissed by the plaintiff therein, and another action immediately begun under a complaint substantially the same as in the first case. The insured did not notify the company of the commencement of the second action, but proceeded to answer and defend the same. The case was on the calendar for trial at Hibbing, when it was settled by stipulation; defendant in the action consenting to the entry of judgment against it for the sum of $1,350. This judgment was entered, and was paid by said defendant. In defending the two actions, the insured was compelled to and did pay the sum of $168.95 for attorney's fees and expenses. In making the settlement the insured acted in good faith, without collusion, and in the exercise of sound discretion and good judgment, being advised that, though the facts were as claimed in its answer, and though it was not legally liable for the death of Vaatanen, it might be held liable in damages to the amount claimed in the complaint; that is, $5,000. Acting under advice of counsel and to avoid further litigation, the settlement was made and the amount paid.

The facts as above stated were found by the trial court. It was also found that the death of Vaatanen was not caused by any negligence of the plaintiff in this action, but was due to Vaatanen's own negligence, or was the result of a risk that he assumed. Under this state of facts, is the defendant company liable to plaintiff for the amount paid in settlement of the case, and for the expenses incurred in defending it?

1. The first question is whether defendant was right in repudiating liability under the conditions of the policy. If the position taken by defendant at the time it refused to defend the action was correct, it follows that there can be no recovery in this action. The claim of the defendant in this regard is now, as it was at the time it denied liability, that the accident was caused by the failure of plaintiff to observe a statute affecting the safety of persons, and therefore that under subdivision 4 of condition 2 it was not liable to indemnify the insured for the loss sustained.

We are unable to sustain this claim. It is based upon the theory that the complaint in the case showed that Vaatanen's death was

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caused by the obstruction of a highway, in violation of chapter 215, p. 284, Laws 1905 [R. L. Supp. 1909, § 1199—1]. But we hold that this law is not a "statute affecting the safety of persons," within the meaning of those words as used in the policy. Chapter 215, and similar laws, are enacted to secure to the public the free use of public highways, and, not especially with reference to securing the "safety of persons." The language of the policy should be construed to refer to such statutes as directly aim to secure the safety of persons engaged in or around dangerous work, as, for instance, laws requiring certain machinery to be guarded. It follows that defendant was bound to settle or defend the action, and was guilty of a breach of its contract when it refused to do so.

2. It was not seriously contended on the argument that the insured was obliged to give the company notice of the second suit. Its denial of all liability and refusal to defend the first action made it apparent that notice of the second action would be useless. We hold it was unnecessary.

3. The refusal of the company to take the defense of the action was unjustified, and constituted a breach of its contract. It agreed by its policy to either settle or discharge any suit against the insured, even if groundless, or at its own cost and in the name of the insured defend the same. It did neither, but, on the contrary, denied all liability, and refused to defend the case. Clearly this breach of contract entitles the insured to recover damages that are the natural consequences of the breach, unless positive provisions of the contract preclude such recovery. On the plainest principles of law and justice, defendant could not thus escape the liability imposed by the policy. Had the case been tried, and a judgment entered against the insured for the full amount claimed in the complaint, it could not be doubted that upon payment of such judgment the insured could recover the amount from the company.

Certain provisions of the contract are claimed to preclude a recovery. There was no "trial of the issue," and no judicial determination that the insured was legally liable for the death of Vaatanen. Defendant contends: (1) That under the policy a judgment rendered after "trial of the issue" is a condition precedent to a recovery;

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and (2) that in any event the amount paid in settlement of the case cannot be recovered, because it does not appear in this action that Butler Brothers was legally liable to pay anything.

4. If the first contention is sustained, it means that whenever the insurer refuses to defend an action, leaving its entire conduct to the insured, the latter, if he is unwilling to lose the benefit of the insurance he has paid for, must go to the expense of a trial, and take the chances of a heavy verdict, very likely in excess of his insurance. He cannot compromise; he dare not accept a favorable proposition of settlement, without releasing the insurer from all liability. This does not sound reasonable or right; but, if such was plainly the contract of the parties, the result cannot be avoided. The company has refused to take the defense, has refused to exercise its right to settle the case, or defend it, as it saw fit, and has left the entire control and conduct of the litigation with the insured, all contrary to its contract. The amount paid on a reasonable settlement constitutes a "loss from the liability imposed by law" as much as does the payment of a judgment rendered after a trial. The condition that no action shall lie against the company to recover under the policy unless it shall be brought by the insured for loss or expense actually sustained and paid in money by the insured in satisfaction of a final judgment, after trial of the issue, has been complied with in every particular except the single one that there was no "trial of the issue." This requirement is, of course, to prevent collusive settlements by the insured and the plaintiff in the action, or the payment of a gratuity. But when it appears, as it does here, that the settlement was in absolute good faith, made to avoid the chance of an adverse verdict for a much larger sum, it would seem grossly unjust, if not contrary to public policy, to insist that there must be in every case an actual trial and verdict. The law favors the compromise of cases, and the ending of litigation. First State Bank of Mountain Lake v. C. E. Stevens Land Co. 119 Minn. 209, 137 N. W. 1101.

We do not regard the case of Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, as committing us to the doctrine that a trial is a condition precedent to recovery when the insurer refuses to defend, contrary to its agreement. The question in that case was whether

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the insurer was liable to pay the amount of a judgment rendered against the insured after a trial of the issue, but before the insured had paid such judgment. In stating that the provision making such payment a condition precedent to recovery against the insurer applied to cases where the company declined to assume the defense, the court was considering the requirement that the judgment must be actually paid by the insured, and not what the result would be in the case of a good faith settlement. This court has never held that when the company, in violation of its contract, refuses to take the defense of the case, the insured may not settle it without relieving the company from all liability for its breach of the contract. And we are not aware of any such holding by any court, unless Patterson v. Adan be construed as so holding, or the New Hampshire decision followed in that case. It may well be true that, when the insurer refuses to take the defense of a case, it does not waive the condition requiring that the insured actually pay the claim, as the latter does not suffer a loss until he parts with his money, and it may be correct, as decided in the Adan case, that this requirement applies only where the insurer has refused to defend; but we do not think that the matter of an actual "trial of the issue" stands on the same basis. It is not the trial that creates the liability insured against, nor is it the judgment. Trial and judgment are merely means by which the fact of liability and the amount are determined; the liability being imposed by law at the time of the accident. As said by Pitney, V. C., in Ross v. American, 56 N. J. Eq. 41, 38 Atl. 22: "The recovery of the judgment is a mere mode by which the insured proves to the insurer that the intrinsic character of the accident was such that he was liable for the consequences of it." Undoubtedly the insured may waive the condition requiring a trial of the issue, and the authorities are practically unanimous in holding that a denial of liability and refusal to take the defense is a waiver of this condition. Especially should this be so where, as in the case at bar, the insurer has agreed to defend all claims within the policy, "even if groundless," and has broken that agreement.

The case of St. Louis Dressed Beef & P. Co. v. Maryland Casualty Co. 201 U. S. 173, 26 Sup. Ct. 400, 50 L. ed. 712, is exactly in

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point here, as is the crisp and vigorous language of Mr. Justice Holmes in the opinion. In that case, as in this, the insurer denied liability and refused to defend the suit, which was settled by the insured out of court. The policy contained the condition requiring a judgment after trial of the issue. It was held that "the refusal of the company to defend the suits constituted such a breach of the contract that it released the assured from the agreement not to settle the claim without its consent, and amounted to a waiver of the condition that it was only liable for judgment rendered against the assured after trial and satisfied." We quote from the opinion:

"The substance of the promise is to pay a loss which the plaintiff shall have been compelled to pay, after such precautions and with such safeguards as the defendant may insist upon. It saw fit to insist upon none. * * * But, notwithstanding the contrary suggestion in Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co. 72 N. H. 485, 498, 499,[1] we think that the only breach which that condition has in view is a refusal by the company to pay after the decision in a case of which it has taken charge, when, notwithstanding the judgment, it conceives itself to have a defense. * * * It would be stretching the words quoted to a significance equally hurtful to both parties, and probably equally absent from the minds of both, to read them as having within their scope an initial repudiation of liability by the defendant and a requirement that in that event the plaintiff should be bound to try the case against itself, although it should be plain that by a compromise it could reduce its claim on the defendant as well as its own loss. * * * If the defendant kept its contract, it would defend the suit, and the plaintiff would have no duties. If it refused to do as it had promised, we cannot think that it was entitled to complain that the plaintiff did not do it when the interest of both was the other way. Before a policy should be construed to have such an extraordinary effect honesty requires that the assured should be notified of his duties in unmistakable words."

Authorities to the same effect are abundant. Many of them were

[1] [57 Atl. 655, 101 Am. St. 688.]

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cited in Patterson v. Adan, and it is unnecessary to note them here. Not readily distinguishable in principle is the unbroken line of authorities holding that, where an insurance company denies liability under a policy of fire insurance, it thereby waives a provision making arbitration a condition precedent to a right of action to recover the loss. The trial and judgment required in a casualty policy, like the arbitration and award required in a fire policy, do not constitute the liability insured against, but are merely the means by which the fact and amount of such liability are ascertained. We hold that, by its refusal to take the defense of the action, defendant broke its contract, and waived the condition therein which required a judgment after trial of the issue, as well as released the insured from its agreement not to settle the case without its consent.

5. The conclusions thus far reached are not, however, decisive of this case. There remains to be considered the question whether, on the record before us, defendant is liable to plaintiff for the amount paid in settlement of the suit. We think there is no question as to its liability for the sum paid by plaintiff for attorney's fees and expenses, as this expenditure was a necessary result of defendant's breach of the contract. But the question of liability for the amount paid to compromise the case is not so clear.

It is settled law that, where one is bound either by law or by agreement to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the suit and opportunity to control and manage it. And if the indemnitee settles the suit without trial he may recover the amount from the indemnitor, providing it was a reasonable sum to pay, and the indemnitee was liable in some amount. Inhabitants v. Chace, 16 Gray (Mass.) 303; Kansas City v. Southern, 151 Mo. 373, 52 S. W. 205, 45 L.R.A. 380, 74 Am. St. 545; Southern v. Fidelity, 26 Ky. L. R. 1217, 83 S. W. 620; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N. W. 698.

The indemnitee is not, however, necessarily liable for the amount paid by the indemnitor in settlement of the case. The question whether the liability of the indemnitee, or the assured, was one which the contract of indemnity covered, is still open, as is also the

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question of the fact and the amount of the liability of the insured. The settlement is not conclusive, either as to the fact that the insured was liable, or as to the amount of such liability. The rule is that these questions are open, and may be litigated and determined in the action brought by the insured to recover the amount so paid in settlement. If it appears that there was no liability in the case settled, the amount paid cannot be recovered. In other words, where there is a trial and judgment in the action against the indemnitee, after notice to defend given to the indemnitor, the judgment is conclusive evidence that the indemnitee was liable, and as to the amount. But where there is no trial and judgment establishing the liability, the question remains open for decision. This is the effect of Minneapolis Mill Co. v. Wheeler, supra, and City of Wabasha v. Southworth, 54 Minn. 79, 87, 55 N. W. 818, and the cases before cited.

But we think a judgment rendered upon a stipulation of settlement should be held to be presumptive evidence of the liability of the insured and the amount thereof. This is held in Kansas City v. Southern, 151 Mo. 373, 52 S. W. 205, 45 L.R.A. 380, 74 Am. St. 545; and Southern v. Fidelity, 26 Ky. L. R. 1217, 83 S. W. 620. See, also, 16 Am. & Eng. Enc. (2d ed.) 180, note 5. It is also, we conceive, the doctrine of St. Louis Dressed Beef and P. Co. v. Maryland Casualty Co., before cited.

One of the questions certified by the Court of Appeals was: "Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer, where the assurer has denied its liability under the policy and has refused to defend an action brought against the assured by the injured person." The answer of the Supreme Court was "in the affirmative, so far as the question is warranted by the facts set forth." It is apparent that the *insured* in that case was insisting upon the right to litigate the question, and it was held that he might. It is not decided where the burden of proof would lie, nor expressly that the settlement was evidence of the insured's liability or the amount thereof. But the language of the opinion is quite inconsistent with

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the idea that the burden is on the insured to prove that he was liable to the injured person. We quote (see page 182):

"We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution."

Though there are decisions that seem to support the view that the insured, if he settles the case, takes his chances of being able to prove, in an action to recover of the insurer, that there was a liability imposed by law on the insured, and that the amount paid was not excessive, this view does not appeal to our idea of equity or law. In effect it would practically preclude the insured from in good faith compromising an action against him when the insurer has refused to settle or defend it, contrary to its agreement. The insured, in order to protect himself, must permit the issue to be tried, and a judgment rendered, or must take his chances of being able to prove, in the action against the insurer, that he was in fact liable in the original action. This would be an ungrateful and often a difficult task. It would mean that the insured must establish his own negligence. Nor does it seem right that a settlement made in good faith by the insured, when the result of the case is in doubt, though it be to the advantage of both the insured and the insurer, should relieve the insurer from liability for its breach of contract, unless the insured proves affirmatively that it was liable in the case settled.

If there was bad faith, if the action at the time it is compromised appears clearly to be without merit, so that the payment of any sum is a mere gratuity, we readily concede that the amount paid cannot be recovered of the insurer. But where the insurer has agreed to settle or defend all claims within the policy, "even if groundless," and has refused to do either, thus breaching its contract, and compelling the insured to defend the action, we hold that the insured

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may in good faith make a settlement of the action, and may recover the amount paid on such settlement of the insurer, unless it is made to appear affirmatively that there could have been no recovery had the action been tried. It may well be that a different rule should apply where there is merely the relation of indemnitor and indemnitee, and no positive agreement to defend an action, and no breach of that agreement.

6. It remains to consider the record in the case before us as it bears upon the question whether it is shown that there could have been no recovery for Vaatanen's death, had the trial proceeded to judgment.

It is apparent from the pleadings and the course of the trial that plaintiff's contention was that, though in fact the accident was not caused by negligence on its part, but was caused by Vaatanen's own negligence, yet that plaintiff in the action to recover for his death would or might be able to make a case for the jury, and that the settlement was therefore not only made in good faith, but in the exercise of good judgment. It was the position of defendant, both in its answer and on the trial, that the accident was not within the policy, because it was caused by defendant's failure to obey the statute in relation to obstructing the highway, and, further, that there had been no trial of the action, but instead a settlement without its consent. Defendant does not appear to have contended at any time that plaintiff was not liable for the death of Vaatanen, or that the settlement of the case was not made in good faith and to escape a possible greater liability. Indeed, defendant's position involved the assertion that plaintiff was liable, but that the case was not within the terms of the policy. No attempt was made by defendant to prove that the allegations of the complaint in the death case could not have been proved, at the trial; indeed, defendant introduced no evidence, and that introduced by plaintiff was for the purpose of proving that the accident was covered by the policy, and not to prove or disprove the liability of plaintiff for the accident.

It may fairly be said from the entire record that the issue whether plaintiff was liable for Vaatanen's death was not tendered by the pleadings and not tried. Plaintiff proved that the accident was

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within the terms of the policy, and that the settlement was made in good faith, to avoid a possible verdict for a much larger sum, and to end the litigation. Defendant did not prove, nor was it shown by the evidence introduced by plaintiff, that there could have been no recovery in the action had it not been settled. The finding of the trial court that Vaatanen's death was due to his own negligence, and not caused by any carelessness or negligence or unlawful conduct on behalf of the plaintiff, was not a finding of any fact within the issues made by the pleadings or litigated by consent. It is not a finding that a case for the jury could not have been made, had the action proceeded to trial, nor would the evidence warrant such a finding had it been within the issues and made.

Within the rule we have here laid down, that in order to defeat the action the burden of proof is upon defendant to show that there could have been no recovery in the action settled, we hold that the record before us does not show this. It does show, on the contrary, that the action to recover for Vaatanen's death was a real lawsuit, that it was settled in good faith, and that there is no basis for the claim that the payment was a gratuity. Our conclusion is that plaintiff is entitled to recover, not only the amount expended in costs and attorney's fees incurred in defending the case, but also the amount paid in compromise of the damages for Vaatanen's death.

7. It was not prejudicial error to permit the witness Nelson, attorney for plaintiff in the action by the administrator, to testify that in his opinion he would have been able to prove the allegations of the complaint in that case. The evidence was relevant on the issue of the good faith of the settlement made, a question not in controversy on this appeal. In so far as it tended to show that plaintiff in the action could or would have made a case establishing the liability of defendant for the accident, it was probably objectionable as the opinion of a witness; but the decision indicates that weight was not given to the testimony in this respect, and, if error, it was without prejudice.

Order affirmed.

HOLT, J. (dissenting.)

I dissent. Under the provisions of the insurance contract, and

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the facts found, I do not consider the defendant liable for more than the expenses incurred by plaintiff in the defense of the suit brought against it by the administrator of Vaatanen's estate.

THOMAS GOULD v. CITY OF ST. PAUL.[1]

January 3, 1913.

Nos. 17,744—(122).

Local assessment lien — state tax lien.

Chapter 200, Laws 1905, declaring local assessment liens of certain municipalities, where proceedings for the enforcement of the same are conducted independently of the delinquent tax proceedings of the state, of equal rank with the state tax lien, construed, and *held* to apply to assessment and general tax liens accruing the same year.

Same — priority of lien.

General state tax or local assessment liens levied in a particular year are paramount and superior to similar liens of prior years.

Merger of lien in perfected title.

In the absence of a statute to the contrary, general tax and local assessment liens are merged and extinguished on the perfection of a title under the same.

Tenants in common.

Where title under a state tax lien is perfected by an individual, and title under a local assessment lien is perfected by the municipality levying the assessment, both titles being so perfected in separate and independent proceedings, and the liens being under the provisions of chapter 200, Laws 1905, of equal rank, the parties become by operation of law joint owners of the property.

Action in partition may be maintained.

An action in partition may be maintained against the city of St. Paul to determine rights in property the title to which was acquired as above stated.

[1] Reported in 139 N. W. 293.

Note.—The question of the superiority of lien for special assessments over lien for taxes is treated in a note in 30 L.R.A.(N.S.) 768.

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Action in the district court for Ramsey county for partition of a certain city lot. The answer alleged that in October, 1908, plaintiff began a proceeding to register title to the real estate and defendant was required to answer the application, which it did, and the proceeding was still pending. Further answering defendant alleged that the court had no jurisdiction of the subject-matter of the action. The case was tried before Dickson, J., who made findings and as conclusion of law found that plaintiff was entitled to no relief, and that defendant city was entitled to a valid lien upon the lot for $13.47 and interest and had a further lien for $64.29 and interest. From an order denying his motion for a new trial, plaintiff appealed. Reversed and new trial granted.

William G. White, for appellant.

O. H. O'Neill and *J. P. Kyle,* for respondent.

BROWN, J.

Action for the partition of real property, in which defendant prevailed on the trial below, and plaintiff appealed from an order denying a new trial. The short facts are as follows:

The property involved in the action is lot 14 in block 51, Lawton Bros. Addition to St. Paul. It was sold by the state in November, 1907, in forfeited tax proceedings, for the taxes remaining delinquent for the years 1891, 1892, and 1901 to 1906, inclusive. A forfeited tax deed was duly issued to the National Bond & Surety Company, a corporation, the purchaser at the sale. No redemption was ever made, though proper notice was given, and plaintiff has succeeded to the title and rights of the Surety Company. By a subsequent action to determine adverse claims, plaintiff's title was confirmed as to the record owner and all unknown persons having or claiming any title or interest therein. The city of St. Paul, defendant herein, was not a party to that action.

In the year 1901 the defendant, city of St. Paul, acting through its board of public works, and pursuant to the provisions of its charter, duly levied an assessment against the property for the amount of benefits assessed against it in local improvement proceedings.

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A warrant for the collection of the assessment was duly issued to the city treasurer on May 17, 1902. The assessment was not paid and became delinquent. Such proceedings were thereafter had, as required by law, that judgment was duly rendered against the property for the amount of the assessment, with interest and costs, and the property was subsequently sold at a sale held for that purpose on November 8, 1902. No bidders appearing, the property was duly struck off to the city, and a certificate of sale in due form duly issued. No redemption was ever made, though due notice was given, and the city became the owner of the property, or the owner and holder of such rights as accrued from the sale of the property under the facts stated.

Local assessment proceedings in the city of St. Paul, including the levy, the collection, and proceedings for the enforcement of delinquent assessments, are conducted through the administrative city officers, independently of proceedings by the state for the enforcement of delinquent general state taxes. In other municipalities of the state, the proceedings from the point of delinquency are consolidated; the unpaid assessments being certified to the county auditor, and by him included in the general delinquent tax proceedings. Some confusion has heretofore arisen in respect to rights acquired under the separate proceedings, particularly as to priority of liens. It was held in White v. Knowlton, 84 Minn. 141, 86 N. W. 755, that the lien of the city was subordinate to the lien of the state for general taxes. For the purpose of preventing further conflict of rights naturally resulting from the independent proceedings, and to protect the interests of the city, the legislature enacted chapter 200, p. 255, Laws 1905. For present purposes, it is sufficient to say that by that statute the lien of the local assessment and the lien for the general taxes were declared of equal rank.

In this case plaintiff's title springs from the general tax, and defendant's from the local assessment, the liens of which were, under the statute referred to, of equal rank, neither being superior to the other. The contention of plaintiff, and this is the theory and basis of his action, is that, since plaintiff and defendant each acquired an

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independent title to the property pursuant to the sale in the separate proceedings, and upon distinct liens of equal rank, they became joint owners of the property, or, as otherwise expressed, tenants in common, and that partition proceedings may be maintained to determine the relative rights of the respective parties. The trial court rejected this contention, holding that the rights of the city were paramount and superior to those acquired by plaintiff through the general tax proceedings. Whether the learned judge below was correct in this conclusion presents the substantial question on this appeal.

1. For the purpose of a clear understanding of the case and the question involved, we here set out the statute, a construction of which determines the issue presented. The statute is as follows:

"That all assessments upon real property for local improvements made or levied by the proper authorities of any city in the state, * * * shall be a paramount lien upon the land upon which they are imposed from the date of the warrant issued for the collection thereof, and of equal rank with the lien of the state for taxes which have been or may be levied upon said property under the general laws of the state; and that the general rules of law as to priority of tax liens shall apply equally to the liens of such assessments and to such liens for general taxes, with the same force and effect as though all of the liens aforesaid and all of the taxes and assessments aforesaid, were of the same general character and imposed for the same purpose and by the same authority, without regard to the priority in point of time of the attaching of either of said liens, and a sale or perfecting title under either shall not bar or extinguish the other."

2. While the statute in broad language refers to all local assessment liens and all general tax liens, and declares that they shall be of equal rank, there must necessarily be a limitation upon the particular liens the legislature intended to deal with. It cannot well be said that the lawmakers intended to declare that assessment liens attached to property in a particular year should remain either paramount or upon an equality with like liens attaching during subsequent years, for such a construction would be at variance with the

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clause, found in the body of the statute, that the general rules of law in respect to the priority of tax liens shall apply to the local assessment lien. The rule applied to all other liens is that the first in point of time takes priority, while the rule is the reverse in tax liens. As to such liens, "the last shall be first, and the first last." Cooley, Taxation (3d ed.) 875. It is clear that the legislature intended this rule to continue and be applicable to assessment liens and rights accruing thereunder.

It follows that, to give effect to the statute, it must be construed as applying, when declaring the equal rank of assessment and general tax liens, to such as arise from taxes or assessments levied during a particular year. So that, while the two liens for a particular year are of equal rank, those arising during subsequent years, though as between the two concurrent, are paramount and superior to those attaching during preceding years, and must be paid by the prior lienholder to protect his rights. In this view it is clear in the case at bar that the assessments made by the city in the year 1908, as disclosed by the findings of the court, are superior to the rights of plaintiff under the title held by him for taxes for preceding years. If title under the 1908 assessment be perfected, plaintiff's title is entirely cut out. In other words, there is no equality between the tax liens under which plaintiffs claim title and the city assessments made in 1908. This was, as we understand the record, the view of the trial court, and we sustain it.

3. Plaintiff's title to the land is founded upon a forfeited tax sale, and for delinquent state taxes for several years, namely, 1891, 1892, and 1901 to 1906, inclusive. Defendant's title is founded upon a local assessment for the year 1902. The general tax lien of 1902, included in plaintiff's title, and the city assessment for the same year, were under the statute referred to of equal rank, and the question to be determined is the status and rights of the parties in a situation like that here presented, where the holders of the separate liens have foreclosed the same and perfected the title thereunder. It is the contention of plaintiff that they became joint owners of the land, while the city contends that its title is superior to that of plaintiff. The theory in support of the city's contention is that the equality de-

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cleared by the statute ceased when the state parted with its rights to a private person at the forfeited sale, and that plaintiff, successor of the purchaser at that sale, took his title subject to the lien of the local assessment. We are unable to sustain that view of the law. The position of the city and of the trial court would be entirely correct, had the assessment in question remained in the form of a lien, and so continued after plaintiff's title was perfected. As a lien it could only be discharged by payment. But did such lien continue?

Tax liens, as well as those arising from local improvement proceedings, are purely of statutory creation. Their duration, force or effect is controlled entirely by the statutes creating them. In all respects not covered by statute, the rules and principles of the common law prevail. Under section 975, R. L. 1905, general taxes are declared a "perpetual" lien from May 1 of the year in which they are levied until paid. The charter of the city of St. Paul (section 32, tit. 3) provides that all local assessments "shall be a paramount lien on the real estate on which the same may be imposed, from the date of the warrant issued for the collection thereof." Generally speaking, a lien of this character, as well as other liens upon specific property, cease and terminate upon an appropriation, in due proceedings, of the property to the payment of the debt. And it has often been held, in the absence of a statute to the contrary, that tax liens, under the system of foreclosure in force in this state, namely, by judgment of court and sale of the property, become merged in the judgment, and are finally extinguished and discharged upon a valid sale of the property. State v. Bellin, 79 Minn. 131, 81 N. W. 763; State v. Johnson, 83 Minn. 496, 86 N. W. 610; Schneider v. City, 135 Mich. 570, 98 N. W. 258; 37 Cyc. 1150. The lien does not, in the absence of some statute so providing, survive or continue after the foreclosure thereof in the manner provided by law, namely, by extinguishing the right of redemption. Byers v. Minnesota Commercial Loan Co., 118 Minn. 266, 136 N. W. 880; 2 Cooley, Taxation (3d ed.) 1017. Such was the rule as respects state tax liens prior to the insertion of the word "perpetual" in the tax lien statute by the amendment of 1902, now section 975, R. L. 1905; and whether that amendment has changed the rule we need not stop to consider. Rochford

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v. Fleming, 10 S. D. 24, 71 N. W. 317. The charter of the city of St. Paul contains no such language, and the general rule as to the duration of such liens controls.

In the assessment proceedings in question, judgment for the assessment against the property was duly rendered, and at the subsequent sale thereunder the city became the purchaser of the property, thereafter terminating the right of redemption by proper notice as provided for by the charter. Within the rule stated, this completely extinguished the lien, and vested in the city the ownership of the property. The lien was gone, and in its place the city was the owner of the property. Schneider v. City, supra; 2 Page & Jones, Taxation by Special Assessment, 1194. Defendant is not, therefore, in the position of a lienholder, and cannot prevail upon the theory that it has a paramount lien. The clause in the statute heretofore quoted in full, declaring the assessment lien paramount to all other claims or liens, was intended and must be construed to apply to all private claims or liens upon the specific property, and not to bar a purchaser from the state from the position of equality with one who acquires title from the city through the local assessment proceeding.

4. What, then, are the rights of the parties? It is unnecessary to refer particularly to the various provisions of the city charter defining or granting rights to purchasers at sales under assessment proceedings. It is sufficient to say that all purchasers at sales are, after the time of redemption, vested with the absolute title to the property. The city, as such purchaser, stands in the same position as a private person. It acquires the same rights and occupies no superior position. 2 Cooley, Taxation (3d ed.) 978; Connecticut v. Wood, 115 Mich. 444, 74 N. W. 656; Dyke v. Whyte, 17 Colo. 296, 29 Pac. 128. The title acquired by the city accrued on the eighth day of November, 1907, the time of redemption having expired on that day. The forfeited tax sale under which plaintiff acquired title was had on November 25, 1907, or 17 days after the title of the city had become absolute on the failure of the owner to redeem. Plaintiff's title became absolute on February 20, 1908, and was in fact founded upon a tax lien of equal rank with the lien made the foundation of defendant's title. Under the statute referred to, the perfection

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of title under the assessment did not bar or extinguish the state's lien. The statute so expressly provides. Such being the situation, it is clear that the state was within its rights when it proceeded subsequently to the date when title became vested in the city under the assessment lien to sell the property in the forfeited tax proceeding. It is equally clear, since the perfection of title in the city was without prejudice to the rights of the state, that the forfeited sale vested in the purchaser, after the expiration of the time for redemption, title to the property.

Plaintiff, as such purchaser, either acquired title, or he acquired nothing at all. He could not redeem from the city assessment sale, for the time of redemption therefrom had expired at the date of his purchase at the forfeited sale. And even if the case had been one where he could have redeemed from the city the law does not impose that as a condition to the completion of the title under his purchase. The foundation of his title was of equal rank with the foundation of the assessment title, and both must stand or fall together. If the title held by the city had been acquired by an individual, there could be no question that the relation of a joint tenancy would have arisen by operation of law. And since the city acquired no rights which would not have passed to an individual, the same result follows. The city and plaintiff were joint or concurrent lienholders, the separate foreclosure of which vested in them separate, independent, yet common, rights in and to the property as a whole.

The theory of the city that rights of priority arise in favor of the city or state, upon a sale in foreclosure by either, cannot be adopted without reading into the statute a provision not now found there, and work a practical nullification of the intention of the statutes to preserve and protect the rights and interests of both. Both the parties here before the court have perfected title to the property, neither can redeem from the other, and unless a joint ownership arises from the facts stated one or the other must be held without right. If the case was reduced to this situation, the city would fail; for the title of plaintiff was subsequent in point of time, and in part upon liens for years subsequent to the assessment lien, and therefore superior to that lien. The legislature did not intend that result, but did intend,

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as we conceive the purpose of the legislation, to place both upon an equal footing. Each acquired certain rights under the sales, and it was competent for the state to transfer those arising from the forfeited sale to plaintiff, and plaintiff became thereby upon an equality with the city. The parties are therefore entitled to share ratably in the proceeds of the property. Stiles v. Galbreath, 69 N. J. Eq. 222, 60 Atl. 224.

5. The other questions raised and discussed in the briefs do not require extended mention. There can be no serious question of the liability of a municipality holding title to real property in common with an individual to a suit in partition. So far as concerns the property rights of a municipal corporation, the general rules and principles of law apply to controversies between itself and an individual, the same as between individuals. Nor do we apprehend any particular difficulty in the protection by the trial court of the interests of the municipality in cases of this kind. The whole matter of the sale and distribution of the proceeds is within the control of the court, and it goes without saying that a fraudulent or collusive sale will readily be detected, and confirmation refused. And, finally, if the statute in question, as here construed and applied, is likely to jeopardize the interests of the city, it may be amended so as to avoid that result. As enacted, we discover no way of applying it, consistent with its language, except as here indicated. Connecticut v. Wood, 115 Mich. 444, 74 N. W. 656. The complaint states a cause of action for the relief demanded.

Order reversed, and new trial granted.

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CHRIS ALBRECHT v. JOHN C. LATZKE.[1]

January 3, 1913.

Nos. 17,800—(117).

Decision not sustained by evidence.

In this action, brought by plaintiff for an accounting and recovery of one-half of the proceeds alleged to have been received by defendant from the sale of a section of land owned jointly by the parties, but the title of which had been taken in the name of the defendant, the court's order denying defendant's motion for a new trial, after making findings directing judgment for plaintiff, held erroneous, on the ground that the evidence does not justify the decision.

Action in the district court for Scott county for an accounting relative to the sale of certain lands and that plaintiff recover $4,800. The case was tried before Morrison, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff. From an order denying defendant's motion for a new trial, he appealed. Reversed.

Jesse Van Valkenburg and *George S. Grimes,* for appellant.

F. C. Irwin and *W. H. Leeman,* for respondent.

HOLT, J.

The material allegations of the complaint are: That in July, 1906, plaintiff and defendant jointly purchased a section of land in Saskatchewan, Canada, for the purpose of speculation. The whole consideration was paid in cash by defendant, and the title taken in his name; plaintiff giving his promissory note to defendant for his half of the purchase price, which note has since been paid. The written agreement under which the parties embarked in the venture is attached to the complaint, and therefrom it appears that plaintiff had the right to sell the land for such price as he might see fit, but not for less than it cost, unless defendant gave his consent. When

[1] Reported in 139 N. W. 158.

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so sold, defendant agreed to convey to the purchaser. The price received was to be equally divided between plaintiff and defendant. It is then averred that on February 15, 1907, the section was sold by plaintiff and defendant to Harvey & Hepburn, by agreement, for $9,600, and pursuant thereto defendant conveyed the land to them, and he received the purchase price, either in money or in other lands conveyed to him, or to other parties, to whom defendant directed the conveyance of the lands so received should run. The allegations then are that defendant has retained the whole consideration received, and refuses to pay plaintiff any part thereof, and an accounting is asked, and judgment demanded for the amount found due.

The defendant admitted the agreement with plaintiff under which they bought the section referred to, and its sale or exchange by mutual consent to D. W. Harvey and W. F. Hepburn. The answer also sets forth, and the undisputed testimony shows, these facts:

That plaintiff, who had been in the business of selling Canadian lands a number of years, negotiated for the deal with Harvey & Hepburn. In so doing plaintiff and defendant procured H. B. Kamp and F. J. Bohland to take an equal interest with them in the lands obtained from Harvey & Hepburn. In the agreement executed by Harvey & Hepburn, as vendors, and plaintiff, defendant, Kamp, and Bohland as vendees, the vendors agreed to sell and the vendees to purchase the vendors' equity in 11,760 acres in Manitoba, held under a purchase contract from the Crown, paying therefor in cash, and by conveying to the vendors the said section of land in Saskatchewan, valued at $9,600, and also assuming the balance due under the contract from the Crown. Defendant conveyed the section of land as agreed to Harvey & Hepburn. Shortly thereafter plaintiff and his associates discovered that Harvey & Hepburn had made false and fraudulent representations as to the Manitoba land. They employed an attorney to investigate and attempted to rescind. Plaintiff seemed the chief mover in this, and accompanied the attorney to Canada in an effort to recover what had been parted with, or obtain some redress from Harvey & Hepburn. In the meantime the latter had sold and conveyed the section obtained from defend-

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ant. Their efforts to obtain reparation for the swindle proving unsuccessful, plaintiff and his associates began an action in the Supreme Court of Saskatchewan against Harvey & Hepburn, to set aside and annul the agreement with the latter, and to recover what plaintiff and his associates parted with, and, failing in that, for the damages sustained. In the action those to whom Harvey & Hepburn had sold the section received from defendant in the deal were made parties defendant. That suit was pending and undetermined when plaintiff brought the present action. For some reason, not disclosed by the evidence in this case, plaintiff changed his attitude toward that litigation in Canada, so that by amendment of the proceedings it was deemed proper to transfer him from a party plaintiff to a party defendant.

At the trial of the case at bar it appeared that, after he was so transferred in this equity suit in Canada, a stipulation was entered into that plaintiffs therein would make no personal claim against this plaintiff unless he appeared and defended at the trial. In the suit in Canada to rescind it was held that the defendants therein who had bought from Harvey & Hepburn the section deeded the latter by defendant, as above stated, were innocent, good-faith purchasers, and since, therefore, the section could not be recovered, judgment was rendered rescinding the contract with Harvey & Hepburn and awarding damages against the latter and in favor of these plaintiffs therein, namely, Kamp, Bohland, and Latzke, in the amount of $15,600 and costs, being for the value of said section, namely, $9,600, and $6,000 cash paid by plaintiff's associates, Bohland and Kamp, to Harvey & Hepburn. Nothing has been collected on this judgment. Harvey & Hepburn have left Canada, and, as far as the court permitted the evidence to go, we are of the opinion that the court's finding, if material, that this judgment, entered subsequent to the commencement of the instant case, is "of full value, as shown by the evidence," is manifestly contrary to the evidence. Plaintiff admitted that Harvey & Hepburn gave him a check as part commission for making the deal. However, he claims the check proved worthless. The court excluded testimony offered by defend-

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ant that plaintiff had a secret agreement for a large commission from Harvey & Hepburn for negotiating the trade.

We need consider no other assignment of error than the one denying defendant's motion for a new trial on the ground that the decision of the trial court is not justified by the evidence. Admittedly the title to the section of the Saskatchewan land was in defendant, but was held for the joint use of plaintiff and defendant. Latzke v. Albrecht, 113 Minn. 322, 129 N. W. 508. Plaintiff and defendant joined in transferring it to Harvey & Hepburn; the defendant merely carrying out the joint undertaking by executing the deed. Each obtained exactly what plaintiff bargained for, namely, an interest with their associates in the Manitoba lands. Now, one of two things must be true: Either plaintiff still retains his interest in these lands under the Harvey & Hepburn contract, or else he succeeded to what the court substituted for such contract when it adjudged the same rescinded for fraud and awarded judgment for damages; such judgment including the value of plaintiff's and defendant's section in Saskatchewan, which the court was unable to restore to them. If the first alternative be true, plaintiff has no claim against this defendant. If the second be true, it seems equally clear that plaintiff is equitably entitled to an interest in the judgment. He can go no further in his demands against defendant, in the absence of proof that any part of the judgment has been collected, or that defendant has taken any steps in the nature of a conversion of plaintiff's interest in the judgment. Defendant has obtained absolutely nothing for the Saskatchewan section, except what is represented by this judgment against Harvey & Hepburn, and the record discloses that he and his associates are willing, and offered at the trial, to assign to plaintiff an equal share in that on payment of a proportionate part of the expenses incurred in obtaining it.

It is not possible for plaintiff to take the position that by the action to rescind, after plaintiff's position therein was shifted from that of a party plaintiff to that of a defendant, there was a conversion by this defendant, Kamp, and Bohland of plaintiff's interest in the Harvey & Hepburn contract, because plaintiff, as party defendant, had his day in court, and did not then make any such claim,

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nor in any manner oppose the rescission asked. If that action in any manner was an attempt to subject this plaintiff's rights in the Manitoba land, or in the benefits to be derived from a rescission of the contract of purchase, to the rights of Kamp, Bohland, and this defendant, plaintiff should have therein protected his interests. But from the pleadings and stipulations in the said action it appears that this plaintiff offered no objection to the progress of the suit, but voluntarily let it proceed to such judgment as the court should give, so long as no personal claim was made against him. At no time since the unfortunate trade has defendant ever denied plaintiff an equal interest with himself in everything that accrued to them therefrom. In buying the section of land in Saskatchewan, plaintiff and defendant looked for profits to share. When, instead of profits, loss came, both law and equity require this to be borne equally. The section of land is irretrievably lost to both, and the only relief the law could give, when resorted to, was a judgment. We agree with defendant that plaintiff is entitled to a share in this, or in any amount that may be collected thereon, first deducting the expenses incurred by his associates in obtaining it. If any one of the four who made the losing deal with Harvey & Hepburn were more to blame than another, the record points to plaintiff. Our conclusion is that the trial court erred in denying defendant's motion for a new trial.

Order reversed.

WILLIAM H. MASON v. OLIVE R. FICHNER and Another.[1]

January 3, 1913.

Nos. 17,814—(83).

Mortgage — estoppel to deny.

Where the plaintiff conveyed land to one of the defendants by absolute

[1] Reported in 139 N. W. 485.

Note.—As to whether a deed absolute on its face, but intended as a mortgage, conveys a legal title, see note in 11 L.R.A.(N.S.) 209.

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deed, which was recorded, and on the same day took back an executory contract of sale from the grantee, which contained provisions for the construction of a house on the premises by such defendant, and also authorized her to mortgage the property for a certain amount, which contract, however, was not recorded, a mortgage so executed upon the premises in favor of the other defendant, and which was in entire accord with the terms of the authorization contained in the contract of sale, and which was virtually ratified by the plaintiff, before the money secured thereby was paid over to the mortgagor, by his withdrawal of objections theretofore made to the mortgagee, was not subject to equities asserted by the plaintiff against the grantee in the deed.

Equitable action.

An action to determine adverse claims may be either legal or equitable, according to the facts and the relief sought; and hence, where the plaintiff sought to have a deed and contract of sale declared to constitute a mortgage, and to have the same adjudged inoperative because of violation of the mortgage tax law, the action was of equitable cognizance, and as such was subject in its determination to the rules that equity will not enforce a forfeiture or grant relief to one who has neither done equity in the premises nor indicated his willingness to do it.

Deed as mortgage — evidence.

The plaintiff, in an action to determine adverse claims, *held* entitled to show that a warranty deed executed by him to the defendant, and an executory contract of sale back to him, of even date therewith, constituted a mortgage.

Action in the district court for Ramsey county to determine adverse claims to a certain city lot. The substance of the pleadings is given in the opinion. The case was tried before Dickson, J., who made findings and conclusions of law as set out on page 189, infra. Plaintiff's motion for judgment notwithstanding the verdict or for a new trial was denied. From the order denying his motion for a new trial, plaintiff appealed.

Affirmed as to the Northwestern Trust Company and as to the Minnesota Investment Company.

Reversed as to Olive R. Fichner, and a new trial granted upon the sole issue as to whether the deed and contract in question constitute a mortgage as between the parties thereto.

William H. Mason and *Harris Richardson,* for appellant.

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Arthur Christofferson and *J. A. A. Burnquist,* for respondent Fichner.

John D. O'Brien, Dillon J. O'Brien and *Ira C. Oehler,* for respondent Northwestern Trust Company.

PHILIP E. BROWN, J.

The plaintiff, being in possession of the real property in controversy, brought this action, under R. L. 1905, § 4424, to determine adverse claims. The complaint was in the usual form. It alleged that the plaintiff was in possession of the property, that the defendants claimed title thereto, liens thereon and interests therein, and demanded judgment adjudging his ownership of the property, and that the defendants had no title thereto, liens thereon, or interest therein.

The defendant Fichner answered separately, admitting that the plaintiff resided on the premises, but alleging that such possession was pursuant to the terms of a written agreement executed by the plaintiff and this defendant, a copy of which was attached to and made a part of the answer. This defendant further alleged: "That she is the owner in fee simple of the real estate described" in the complaint, subject to a mortgage for $3,000, of date September 29, 1910, executed by the defendant Fichner and her husband to the defendant trust company. She denied all other claims.

The defendant trust company also answered separately, alleging, among other things, that on September 29, 1910, the defendant Fichner borrowed from this defendant $3,000, and to secure the same executed to it a mortgage as a first lien on the property herein involved, and demanded judgment so adjudging.

For reply to the defendant Fichner's answer the plaintiff interposed general and specific denials, and affirmatively alleged that his possession of the property in controversy was under the terms of a warranty deed from Louise Caldwell, executed to him July 31, 1909, and also expressly denied that Fichner was or ever had been the owner of the premises, and demanded judgment as in the complaint stated. For reply to the answer to the trust company, the plaintiff admitted the execution of the Fichner mortgage to the

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trust company, but alleged that when it was executed such company knew that Fichner did not own the property, and also that the plaintiff was the owner and in possession thereof, and prayed judgment as demanded in the complaint.

The action was tried by the court without a jury. On the trial it appeared that the plaintiff was in possession of the premises at the time of the bringing of the action, and had been in possession thereof at all times herein mentioned, and, further, to sustain the allegations of his complaint, the plaintiff introduced in evidence a deed, dated July 31, 1909, from Louise Caldwell, who was admittedly the then owner of the property herein involved, and the common source of title of all the parties to the action, which deed was recorded February 1, 1910. The plaintiff then rested. The defendant Fichner, to sustain the issues on her part, introduced in evidence the record of a deed from the plaintiff and his wife to her, conveying the same premises, and of date May 19, 1910, recorded May 23, 1910, and rested. On behalf of the defendant trust company, a mortgage dated September 29, 1910, executed by the defendant Fichner and husband to it, covering the premises in controversy, was introduced in evidence, being the same mortgage described in the answer of each of the defendants, and also established that the mortgage remained unpaid, and then rested. Thereupon the plaintiff sought to prove that no portion of the cash consideration recited in the deed from him to the defendant Fichner was ever paid to him by Fichner or by any one in her behalf, and that nothing had ever been paid on account of such consideration or the transaction involved in such deed and also that the contract referred to in defendant Fichner's answer was executed contemporaneously with the deed to Fichner and as a part of the same transaction, and followed this with an offer of evidence tending to show that the deed and contract in question in fact constituted a mortgage, and that no tax had been paid thereon as required by law. Each and all of these offers were excluded as irrelevant and immaterial, to which the plaintiff duly excepted. The contract, however, between the plaintiff and Fichner, was admitted upon the plaintiff's proffer thereof. It bore date

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May 19, 1910, and on its face was an executory contract for the sale of land.

The court made findings of fact, in substance as follows: (1) That the allegations of the complaint and the reply, as to the plaintiff's title and right of possession of the property, were untrue; (2) that the allegations of Olive R. Fichner's answer, and the allegations of the trust company's answer as to its mortgage, were true; and, furthermore, as conclusions of law: (1) That the plaintiff was not the owner of the property, and was entitled to no relief; (2) that the defendant Olive was the owner in fee of the property, subject to the mortgage of the trust company and to the contract mentioned; and (3) that the trust company's mortgage was a valid and subsisting first lien upon the property in controversy. Subsequently the plaintiff moved for amended findings. On February 10, 1910, this motion was denied. Thereafter plaintiff moved for judgment in the alternative or for a new trial upon a settled case. This motion was denied, and the plaintiff appealed from the order.

1. Before entering upon the discussion of the case as between the plaintiff and the defendant Fichner, we will consider the status of the trust company with reference to the property here involved. The plaintiff claims that the trust company stands in the shoes of the Fichners, and that its mortgage is inoperative, because given by one who was herself only a mortgagee, and who, therefore, had no title or interest which she could convey or incumber. In short, the plaintiff claims that the trust company's sole claim against the property, if any it has at all, is as assignee of the mortgagee, Olive Fichner. These contentions cannot be sustained, for we consider the position of the trust company to be entirely independent of and free from any equities that may exist between the plaintiff and the Fichners.

The facts are that the plaintiff executed to Olive Fichner a warranty deed in the usual form, which was duly recorded, and thus the indicia of title to the land were placed in her. On the same day the defendant Olive and her husband and the plaintiff and his wife entered into a contract in writing wherein the Fichners contracted to sell the same land to the Masons, and also to have constructed a

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house thereon in accordance with certain plans and specifications, and it was agreed that the Masons would assume any mortgage, up to $3,200, to run from three to five years, which the Fichners might see fit to place upon the premises, which contract was not recorded. Thereafter the Fichners borrowed from the trust company the sum of $3,000, and secured the same by a mortgage on the land in question, which conformed in all respects to the conditions specified in the contract between the Fichners and the Masons. Before the money so borrowed was paid to the Fichners, however, Mason notified the trust company by letter that the contract had not been performed by the Fichners according to its terms, claimed certain rights and interests in the premises, and suggested that the company should take such steps as might be necessary to protect itself. The loan was, therefore, held in abeyance by the trust company, and the money was not paid over to the Fichners until some two weeks later, and not until after the Masons wrote the trust company in effect that they withdrew all objections to the placing of the loan. A house purporting to conform to the contract was erected on the premises, and the Masons moved into and occupied the same.

It is on this state of facts that the plaintiff, in his original brief, asserts the right to avoid the trust company's mortgage in toto, which claim is somewhat modified in his reply brief, wherein he asserts the right to subordinate the mortgage to certain equities between himself and the Fichners, growing out of their alleged failure fully to perform their contract with relation to the construction of the house, and incidentally to litigate in this action his claim to such equities. That such contentions cannot be upheld is, we think, too clear for extended argument.

The plaintiff, by his deed, placed the indicia of title in the Fichners; the contract, asserted by the plaintiff as a defeasance, expressly authorized the Fichners to place a mortgage on the property; the mortgage was so placed; and the Masons expressly ratified the transaction by their withdrawal of objections previously made thereto. It would be a reproach to any system of jurisprudence to declare, under these circumstances, that the plaintiff's alleged equities are superior to the rights of the trust company.

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2. We will now consider the case as between the plaintiff and the defendant Olive R. Fichner, and we think it clearly appears that the case came up for trial in the court below upon pleadings and evidence wherein the issues properly determinable between the parties were obscured by the plaintiff's insistent claims to rights, apparently ingeniously made, but so grossly inequitable, when taken all together, as to shock the conscience. It comes here in the same manner and upon an involved record. The way will, therefore, be cleared to a view of the questions properly involved, by a preliminary consideration of the character of the action, and also the issues made by the pleadings, concerning which the parties seem to disagree; and light will be thrown upon both of these questions by reference to the facts which the plaintiff insisted upon the right to prove on the trial, and the claims he made upon the proofs received and also those offered and excluded.

But before taking up these questions, and at a sacrifice of the logical order, we will step aside to say that, conceding that the plaintiff was actuated, as claimed by him, by worthy motives in bringing this action, such motives are wholly immaterial, which, we think, must be apparent when we consider them from the viewpoint of admissibility of evidence, if such had been offered on the trial, to establish them. Such evidence would certainly not have been admissible. A motive cannot of itself constitute a cause of action, nor can a good motive aid one; and though it is, of course, highly desirable that litigants should not be actuated by evil motives, a right cannot be defeated merely because an unworthy motive moves its possessor to its enforcement.

And likewise, in passing, we will say that the plaintiff's claim that he should be allowed to maintain this action in order to fix the status of the parties, in view of further litigation contemplated by him against some of the defendants, and his complaint that the defendant Fichner's answer was insufficient in its allegations to enable him, the plaintiff, to try out in this action certain questions which he deems to require litigation in order that he may obtain his legal rights, and that he is seeking a remedy for a breach of the contract between him and the Fichners—these, as well as other questions of a

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purely collateral nature urged by the plaintiff, are not, to borrow a phrase from his brief, "worthy of sober consideration." We will say, however, that the plaintiff's contention that the defendant Fichner's answer was insufficient, because it failed to set up her title in greater detail than was done, cannot be sustained. While it is undoubtedly true that the rules of pleading required her to set out her claims to the property, she was not required to plead the evidence upon which her title and claims rested.

Returning, now, to the character of the action before us: Was it of legal or of equitable cognizance? Under our decisions, actions to determine adverse claims may be either, according to the facts. 2 Dunnell, Minn. Dig. § 8040. But there can be no fair doubt as to which class the instant case belongs, when we consider the plaintiff's claims, and the relief that would have to be granted, if the same were well founded.

Stripped of all veneer, the plaintiff's position is that his deed to Mrs. Fichner and the contract of even date therewith, when taken together, constituted, by operation of law, a mortgage—or, in any event, that it was open to extrinsic proof that it was such—which, by reason of Laws 1907, p. 448, c. 328, §§ 1, 7 [R. L. Supp. 1909, §§ 1038—25, 1038—31], was inoperative to establish either a title to or lien upon the property, because of its failure to show on its face that it was a mortgage, and because of the grantee's failure to pay the mortgage tax. Now, if the claim that the deed and contract together constitute a mortgage, and as such are invalid, is to be sustained, the remedy to fully restore the plaintiff to his interest in the property, and to remove the cloud thereon created by these instruments, would be cancelation, a purely equitable remedy, which has never been within the jurisdiction of courts of law. Pomeroy, Eq. Jur. (3d ed.) §§ 171, 188. The action, therefore, is purely equitable, upon the plaintiff's own theory; and, such being the case, when did equity ever enforce a forfeiture? See Pomeroy, Eq. Jurisdiction (3d ed.) §§ 459, 460; Bispham, Eq. § 181. Aside from the question as to whose duty it was to pay the tax, which we do not here decide, the plaintiff practically seeks to have his debt to Fichner discharged, or at least to deprive her of all security, because she failed

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to pay the tax. In other words, he seeks to enforce a forfeiture against her because of her violation of the revenue law, and that equity will not affirmatively aid him in such attempt would seem too clear for further discussion. The plaintiff's claim, furthermore, lacks another essential to the right to equitable relief, in that, so far as disclosed by this record, he makes no claim that he has done equity by the defendant Fichner, or of his willingness to do equity; his insistence contravening any intention as to the latter.

It is suggested that a fair construction of the mortgage tax law would not bring the instant case within its provisions. However this may be, we are averse to resting our decisions against the plaintiff's contention upon grounds of statutory construction, which are necessarily narrow, frequently requiring the ascertainment of legislative intent by deductions from meager data. We place our decision squarely upon the broad foundation that the plaintiff's efforts to escape his obligations and to enrich himself by despoiling the defendant Fichner, because of the claim that she has violated a revenue measure, is wholly without equity.

3. It does not follow, however, that the plaintiff is not entitled to some relief in this action. If, by operation of law, the deed and mortgage, when taken together, of themselves constitute a mortgage, then the court erred in finding that the plaintiff was not the owner of the property and was entitled to no relief, and also erred in finding that the defendant Olive R. Fichner was the owner of the property in fee simple, subject to the contract of sale between her and the Masons. If, on the other hand, such instruments do not as a matter of law constitute a mortgage by virtue of their terms and contemporaneous date, then the court was equally in error in sustaining objections to the extrinsic evidence offered by the plaintiff tending to establish such fact. It is elementary that the form of an instrument cannot preclude a party from showing that it is in fact a mortgage, and that extrinsic evidence, including parol testimony, is admissible for this purpose, when within the issues made by the pleadings, is equally well settled; and we think that the pleadings in this action were sufficient to admit such evidence, though insufficient to permit the plaintiff, against the objection of the defendant, to liti-

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gate his claim for damages growing out of the alleged failure of the defendant Fichner to construct the house on the premises in conformity with the agreed plans and specifications.

We cannot now hold, as claimed by the plaintiff, that the deed and contract, when taken together, but without the aid of extrinsic evidence, constitute a mortgage. It is doubtful if this question was considered at all by the trial court, whose attention might well have been diverted therefrom by the plaintiff's persistent insistence upon his claims under the mortgage tax law, and it was discussed in this court by only one party to the appeal. We think that it should be squarely passed upon by the court below in the first instance.

Nor will we discuss the effect of the mortgage tax law, except to say that under the doctrine of Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455, if it should ultimately be found that the deed and contract here involved constitute a mortgage, that it was the defendant Fichner's duty to pay the tax, and that she did not pay it, but that the form of the deed and the failure to pay the tax were not due to any attempt to evade this law, then such mortgage could not be held void on account of the matters now urged against it.

The Minnesota Investment Company was practically eliminated from the case below, and we think that it is manifest, as found by the trial court, that it has no interest in or claim upon the property herein involved or in this litigation.

Order affirmed as to the defendant the Northwestern Trust Company and as to the Minnesota Investment Company.

Order reversed as to the defendant Olive R. Fichner, and a new trial granted upon the sole issue as to whether the deed and contract in question constitute a mortgage as between the parties thereto.

No statutory costs will be allowed to the appellant on this appeal.

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BARBARA HAVEL v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.

MARIE KROC v. SAME.[1]

January 3, 1913.

Nos. 17,849—(124).

Negligence — defendant not entitled to directed verdict.

Evidence in this, a personal injury action, as to the defendant's alleged wilful negligence, considered. *Held*, that the defendant was not entitled to a directed verdict in its favor on the issue as to its wilful negligence.

Two actions in the district court for Ramsey county by the administratrix of the estate of Vaclav Havel, deceased, and by the administratrix of the estate of Rudolph Kroc, deceased, to recover $7,500 in each case for the death of their intestates. The defense in each case was negligence on the part of plaintiff. The cases were tried together before Hallam, J., and a jury which returned a verdict in favor of Barbara Havel for $1,365.84 and in favor of Mary Kroc for $2,911.67. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant in each case appealed. Affirmed.

W. H. Bremner, Eugene Bryan, F. M. Miner, and *George W. Seevers,* for appellant.

Moritz Heim, John D. O'Brien and *Dillon J. O'Brien,* for respondents.

START, C. J.

On the morning of January 16, 1911, at 6:35 o'clock Vaclav Havel and Rudolph Kroc were walking, as had been their custom and that of others for several years, on the defendant's right of way and tracks from Hopkins to the Monitor Drill Works, near St. Louis

[1] Reported in 139 N. W. 137.

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Park, where they were and had been employed for some time. When they had reached a point about midway between the towns, they were struck and instantly killed by the defendant's passenger train. The administratrix of the estate of each brought an action in the district court of the county of Ramsey to recover damages sustained by the death of her intestate. The issues in each case were identical, and the two actions were consolidated and tried as one action. The trial court instructed the jury that upon the undisputed evidence each of the intestates was guilty of contributory negligence as a matter of law, and submitted to the jury the issue of the defendant's wilful negligence as the sole basis for a recovery. A verdict was returned for the plaintiff in each case. A motion for judgment notwithstanding the verdict was made by the defendant and denied, and it appealed from the judgment entered on the verdict in each case.

The sole question presented by the record is whether, upon the evidence, the alleged wilful negligence of the defendant was one of fact to be submitted to the jury, or one for the decision of the trial judge in favor of the defendant. There is here no question as to whether the verdict is so manifestly against the weight of the evidence as to entitle the defendant to a new trial of the issue, for there was no motion for a new trial. The rule of law applicable to the question is well settled. Wilful negligence, whereby liability is incurred, irrespective of the plaintiff's negligence, is not simply greater negligence than that of the injured party, nor does it necessarily include the element of malice or actual intent to injure another; but it is a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury. Sloniker v. Great Northern Ry. Co. 76 Minn. 306, 79 N. W. 168; Anderson v. Minneapolis, St. P. & S. Ste. M. Ry. Co. 103 Minn. 224, 114 N. W. 1123.

If, therefore, the evidence in this case was practically conclusive that the defendant's engineer, in charge of the locomotive hauling the train which struck and killed the men, did not discover them on the track in time to avoid striking them by the exercise of ordinary care, the defendant was entitled to a directed verdict. The engineer testified that the train was running from 25 to 28 miles an hour and

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the automatic bell was ringing; that he was at his post and keeping a lookout along the track, which was straight for a mile; that it was dark, and he could not see a man on the track more than 75 to 100 feet ahead; that he saw no one at any time on the track, and did not know or learn that his engine had struck any one until he reached Minneapolis. There was no direct contradiction of his testimony that he saw no one at any time on the tracks. If the jury were bound to accept his testimony as true in its entirety, the defendant was entitled to a directed verdict. There could not, from the very nature of the case, have been any direct contradiction of the engineer's testimony that he did not see any one on the tracks; but the jury were not bound to accept it as true, if other circumstances in evidence furnished a reasonable basis for concluding that it was not true. Lang v. Ferrant, 55 Minn. 415, 57 N. W. 140.

There was other evidence tending to show that the engineer must have seen the men walking on the track and oblivious to their danger, if, as he testified, he was at his post and looking ahead along the track. There was also evidence tending to show that a man could have been seen on the track from 100 feet to a quarter of a mile ahead, and, further, that the defendant's foreman, who passed along the tracks on a hand car at 7:10 o'clock the same morning, saw the men lying on the ground when he was from 100 to 300 feet away. Upon a consideration of the whole evidence, we are of the opinion that the defendant was not entitled to an instructed verdict on the issue of its wilful negligence.

Judgments affirmed.

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GABRIELLA M. MANDELIN v. ARTHUR P. MANDELIN.[1]

January 3, 1913.

Nos. 17,877—(135).

Divorce — findings sustained by evidence.

In an action for divorce on the ground of cruel and inhuman treatment, the evidence is *held* to support the findings of the trial court that the allegations of the complaint were true, and to negative the defense of condonation.

Action in the district court for St. Louis county for absolute divorce; that plaintiff be awarded the custody of the child; that plaintiff be given her maiden name and for alimony. The case was tried before Dancer, J., who made findings and as conclusions of law granted plaintiff the divorce, gave to her the custody of the child, awarded her as permanent alimony the sum of $500, and $15 per month until further order of court or until plaintiff should remarry, and $10 monthly for the support of the child; and ordered that defendant be permitted to visit the child, provided such visits should not unduly interfere with plaintiff's care of the child, and that plaintiff's name be changed to Gabriella Esterman. From an order denying defendant's motion for an order amending the findings and conclusions of law or for a new trial, he appealed. Affirmed.

John A. Keyes and *Bert W. Forbes,* for appellant.

Victor H. Gran and *Warner E. Whipple,* for respondent.

Brown, J.

Action for divorce on the ground of cruel and inhuman treatment, in which plaintiff prevailed, and defendant appealed from an order denying his motion for amended findings and for a new trial.

The defense interposed was a denial of the acts of cruelty charged against defendant, and condonation, by subsequent cohabitation, of any acts of misconduct of which he may have been guilty. It is con-

[1] Reported in 139 N. W. 152.

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ceded that the evidence justified the court in finding as true the general charge of cruel and inhuman treatment, but the finding that there was no condonation is challenged as not supported by the evidence. The question whether condonation was shown as a matter of law, or whether the evidence made the question one of fact, presents the only controversy on this appeal.

It is well settled that continued cohabitation after the commission of a matrimonial offense, with knowledge of the offense, constitutes condonation, and will ordinarily bar an action for divorce by the innocent party. But to operate as such it should appear that the subsequent cohabitation was entirely voluntary, free from restraint, and that thereafter the offending spouse treated the innocent party with conjugal kindness. So long as the cohabitation continues, and the offender refrains from further misconduct, there can be no divorce. When not covered by statute, the rules of the common law prevail, and condonation applies to all charges of matrimonial misconduct, including cruel and inhuman treatment. In cases involving the latter, a continuance of the marital relations does not necessarily constitute an absolute condonation of preceding acts of cruel treatment. The law of condonation rests (1) upon the express or implied forgiveness by the injured party; and (2) the express or implied promise of proper treatment by the other. If the improper or cruel treatment continues, there is no condonation. Rudd v. Rudd, 66 Vt. 91, 28 Atl. 869; Jefferson v. Jefferson, 168 Mass. 456, 47 N. E. 123; 14 Cyc. 637 and 640.

It is proper to inquire, in determining the question in any particular case, into the conditions of life surrounding the parties, their conceptions of the proprieties of the situation confronting them, the reasons justifying a continuation of the marriage relation, and all facts having a pertinent bearing upon the question whether there was on the part of the injured party an express or implied intention to forgive and forget the wrong of which he or she might complain.

In the case at bar the parties are evidently not familiar with the laws, customs, or proprieties incident to their situation as recognized in this country. The plaintiff presented evidence of a long-continued course of ill treatment at the hands of defendant. Yet she did not

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separate from him—on the contrary, continued to live in his home, performing the ordinary household duties, down to the time of the trial of the action. She testified, however, that all sexual relations between them came to an end when she brought her action for divorce. This defendant denied, insisting that these relations continued after the action was commenced. The truth in this respect was for the trial court to determine. It was resolved in plaintiff's favor.

The evidence further shows that although there was no separation, except to the extent stated, defendant continued, after the commencement of the action, the same treatment of plaintiff, and it is apparent from his disposition, as disclosed by the evidence, that the denial of a divorce will give encouragement to him in his efforts to harass and abuse his wife. It further appears that plaintiff had no place to which she could go as a home. She was without friends, and she was fearful, should she leave the home of defendant, that he would take from her the care and custody of their infant son. She was quite explicit in her testimony that she knew that the continuance of sexual relations with defendant after the commencement of the action would be wrong, and that they were terminated. Under the circumstances we think the question of condonation was peculiarly one for the trial court to determine. The parties were before him, and every opportunity to judge of their character and sincerity was then presented, a situation not afforded this court. There is no hard and fast rule controlling the subject of condonation of matrimonial offenses. Each case must be determined from its own facts, and the character and situation of the parties. We think the court below rightly disposed of the question in this case.

Order affirmed.

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WILLIAM S. GREEN v. JAMES M. HAYES and Another.[1]

January 3, 1913.

Nos. 17,884—(123)

Equitable action — question for jury.

In an action to cancel a deed for fraud and for other relief, the trial court did not err in submitting specific questions of fact to the jury. R. L. 1905, § 4164. [Reporter.]

Evidence sustained finding of fraud.

The evidence was sufficient to sustain the findings that the exchange of property was induced by the fraud of defendant. [Reporter.]

Construction of verdict.

The finding of the jury that defendant agreed to return all of plaintiff's papers was equivalent to a finding that he agreed to reconvey the land to plaintiff. [Reporter.]

Reconveyance of title.

The surrender of a deed which had been delivered, but not recorded, would not revest the title to the land in the grantor. [Reporter.]

Question of fact.

Whether the parties to the action made an agreement to rescind a previous agreement to exchange land for a livery stable business was a question of fact for the trial court. [Reporter.]

Action to cancel deed.

Plaintiff conveyed land to defendant and gave his notes and chattel mortgage in exchange for the latter's livery stable business. Eight months after, the parties agreed that defendant should take back the stock and return plaintiff's notes and chattel mortgage. The deed had not been recorded. Plaintiff then brought an action to cancel the deed because of fraudulent representations and for other relief. *Held:* Under the determined facts, plaintiff was entitled to the remedy invoked. [Reporter.]

Action in the district court for Crow Wing county to have a certain deed canceled on the ground of fraud. The case was tried be-

[1] Reported in 139 N. W. 139.

Note.—On the question of the measure of damages for fraud in exchange of property, see note in 38 L.R.A.(N.S.) 465.

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fore Wright, J., who, when plaintiff rested, denied defendant's motion that the case be dismissed, and submitted ten questions to the jury, which answered them in favor of plaintiff. The court subsequently made findings and ordered judgment that the deed be canceled and defendants required to convey the premises to plaintiff by a special warranty deed. From an order denying defendants' motion for judgment in their favor notwithstanding the verdict or for a new trial, they appealed. Affirmed.

Jay Henry Long, for appellants.

M. E. Ryan, for respondent.

PER CURIAM.

Action to cancel a deed on the ground of fraud. In November, 1907, the plaintiff exchanged 80 acres of land owned by him in Crow Wing county for a livery stock owned by the defendant James M. Hayes, giving his notes, and a chattel mortgage on the stock to secure the same, for the sum of $1,089.60, and executed a deed of his 80. Immediately thereafter the plaintiff rented the defendant's barn and began to conduct a livery business therein, continuing to carry on the same until August 1, 1908, when, having paid nothing on the mortgage indebtedness, and but three months' barn rent, the parties, upon a threat by Hayes to foreclose the mortgage, agreed that Hayes should take back the livery stock and return to the plaintiff his notes and chattel mortgage, which was done. At the time of this transaction the deed to the 80 acres of land had not been recorded. The plaintiff claimed that in the agreement last mentioned the defendant agreed, in the further consideration of the surrender of the barn and livery stock, to "give him back all his papers," but that he failed to return the deed or to reconvey the land. The plaintiff thereupon commenced this action, setting out in his complaint, among other things, substantially the facts above recited, and also that he was induced to enter into the exchange by the defendant Hayes' fraudulent representations, specifying them, concerning the profits the latter had made in conducting the livery business traded to the plaintiff, and also concerning the price paid for a certain hack and the soundness of certain horses, all included in the exchange. He also alleged

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a fraudulent representation as to the amount of the notes and chattel mortgage, and averred the rescission of the contract, and the agreement stated with reference thereto, especially the promise to return all the papers, and demanded that his deed be canceled. The defendant answered, admitting the agreement for exchange and its execution, denying all claims of fraud, admitting the making of the agreement to rescind, but claiming that it was not a part of such agreement that he should return the deed for or make a reconveyance of the 80.

The case was tried by the court, and ten questions were submitted to a jury. These questions related to the alleged fraudulent representations, the knowledge of the defendant as to their falsity, the defendant's intention to deceive the plaintiff thereby, and the plaintiff's reliance thereon, and the defendant's agreement, made on the re-exchange, to return all of the papers. The jury answered the interrogatories favorably to the plaintiff's claims. Thereupon, on August 14, 1911, the court made findings and ordered judgment for the cancellation of the deed. Thereafter the defendants Hayes and wife moved for a new trial, which was denied, and this appeal followed.

1. The defendants do not attack the court's findings of fact; their assignments of error being six in number, and the first and fifth being that the court erred in overruling the defendants' objection, made at the beginning of the trial and also at the close of the evidence, to the submission of any of the written interrogatories to the jury. R. L. 1905, § 4164, provides for the submission of specific questions of fact in an equitable action to a jury, and our attention has not been called to any irregularity in the action of the trial court in this regard.

2. The defendants' second and fourth assignments of error relate to alleged error in failing to dismiss the action at the close of the plaintiff's case, and also at the close of all the evidence. The defendants concede that, if the plaintiff made a case against the husband of fraud in the original transaction, then the facts relative to the settlement might have been considered, but argued, under the third assignment, that because no such fraud was established it was error to deny the defendants' motion to strike out all of the testimony tending to show that the deed to the farm was to be returned, and also to dis-

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miss the action for failure of proof. We cannot sustain these contentions, because we are of the opinion that the evidence was sufficient to sustain the findings to the effect that the trade was induced by the defendant James M. Hayes' fraud.

The defendants argue that the finding of the jury, to the effect that the defendant Hayes agreed to return all of the plaintiff's papers, is not equivalent to a finding that he agreed to reconvey the land. We hold otherwise on the facts here shown. A surrender of the deed by the defendants to the plaintiff after its delivery would not have revested the title to the land in the plaintiff; but the finding of the jury meant substantially that the parties rescinded the contract of exchange, and an integral part of such agreement was that the plaintiff should have his land back. Both of the parties evidently considered that this agreement, so far as the land was concerned, would be executed by the return of the deed; it being then unrecorded. In this they were mistaken, not as to the contract actually made, concerning which their minds met, but merely as to the proper means of effectuating it. This defect the law supplies.

3. In support of the last assignment of error, it is urged that the plaintiff's theory as to the defendants' giving up the land is improbable; the insistence being that it is unlikely that Hayes would consent to a practical rescission of the contract of exchange, and thus to the loss which would result to him thereby. Granted. On the other hand, is it reasonable to suppose that the plaintiff, so soon after acquiring a profitable livery business as the defendant claims this was, would have been willing to give it up merely for the return of the notes and chattel mortgage, thus losing the farm? Questions of fact, like those involved in this action, are ordinarily for the final determination of trial courts, and we find no warrant for interfering with the action taken by the court below.

4. Finally, the defendant contends that cancelation was not the proper remedy. There can be no doubt, however, that it would be a fraud on the defendants' part, and against the plaintiff's rights, if the defendants were allowed to breach the contract of re-exchange and to retain the legal title to the land evidenced by the deed. It furthermore appeared that the plaintiff had no knowledge of the falsity of

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the defendant Hayes' representations concerning the profits made by him while conducting the livery business until after the transaction of August 1, 1908. We think that, under the determined facts, the plaintiff was entitled to the remedy invoked.

Order affirmed.

WILLIAM STAGE v. C. H. YOUNG COMPANY.[1]

January 3, 1913.

Nos. 17,910—(133).

Negligence of fellow servant.

Evidence examined, and *held* to show that the cutting of grab hook holes in blocks of stone sawed and dressed in defendant's stone-dressing factory was a necessary detail of the work carried on therein, and that the cutting of such hole by a servant of defendant in a defective part of a stone, so that when lifted it broke, and in falling injured plaintiff, also a servant of defendant, was the negligence of a fellow servant, for which the defendant is not liable.

No evidence of defect in crane.

Also *held*, that there is no evidence in the record from which an inference could fairly be drawn that an alleged defect in the traveling crane, which carried the stone when it fell, in any manner contributed to the accident.

Action in the district court for Ramsey county to recover $15,000 for personal injuries. The answer alleged that the injuries were sustained on account of plaintiff's negligence; that he knew, appreciated and assumed each and every hazard in any manner connected with the work that in any manner caused or contributed to the accident. The case was tried before Dickson, J., who, at the close of plaintiff's case, granted defendant's motion to dismiss the action. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

[1] Reported in 139 N. W. 298.

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James R. Hickey, James A. Martin and *Ray G. Farrington,* for appellant.

Price Wickersham, for respondent.

HOLT, J.

This is an appeal by plaintiff in a personal injury action from an order denying his motion for a new trial; there having been dismissal on motion of defendant after plaintiff had introduced his evidence.

Plaintiff had been in the employ of the defendant for more than a year in operating a traveling crane in the stone-dressing factory of defendant in St. Paul, Minnesota. At the time plaintiff was injured, defendant was engaged in sawing and dressing limestone from the Mankato quarries for the erection of the new state penitentiary at Stillwater. Some of these stones were large blocks, weighing several tons. In loading the large stones on the flat cars at the quarries, it was necessary to cut holes therein, so that the derrick grabhooks used in lifting them could catch hold. The unloading of these large blocks in the yard adjoining the factory in St. Paul, and again the loading thereof on the tram cars to convey them to the different machines and places in the factory, required the use of these holes for the grab hooks of the hoisting appliances, or, if those cut at the quarry were not suitable, defendant's derrickmen would cut holes at the proper place for handling at the factory.

The building in which defendant cut and dressed these stone blocks was upwards of 250 feet long. On one side the entire length was traversed by a traveling crane run by electricity on rails from 15 to 18 feet above the floor and 27 feet apart. From this crane grab hooks were suspended, with chains and cables attached, operated by air pressure, so that heavy weights could, by means of the same, be lifted up to any desired distance between the floor of the factory and this crane. The rails on which the crane traveled ran north and south, and, of course, the beams constituting the bearing part of the crane were at right angles with the rails. Upon these bearing beams a contrivance on rollers, which could be pushed east or west between the rails, held the lifting cable. Even when stones weighing more than

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two tons were suspended, a couple of men could push the load east or west on the crane beams. When it was desired to move the suspended load north or south, after it was in the proper position east or west, plaintiff pulled one of the two cords hanging down from the crane near the west rail. By pulling one cord, the crane with the suspended load traveled north; and by pulling the other, it traveled south. The speed of the crane was that of a slow walk, so that plaintiff had no difficulty to follow and stop it where desired.

The defendant employed one Strom as a foreman in the yard of the factory, who saw to the unloading of the cars which brought the stones from the quarries, selected the stones to be sawed or dressed, in some cases indicating by crayon marks on the stones the manner in which they were to be trimmed or cut, and who generally looked after the work outside the factory. He had experienced men under him, who attended to the actual labor required. Another foreman was employed in the factory, directing the work therein.

On the day of the accident a large stone was among the ones sent in from the yard to be dressed. It is claimed by plaintiff that as it lay flat on the ground in the yard, after the sides and edges were cut, it was 8 feet long, 4 feet wide, 1 foot thick, and weighed about 4,700 pounds. It became necessary to take it into the factory to trim around the edges, and, there being no grab holes, the derrickmen cut one in each end about 8 inches from the edge of one side as the stone lay on the ground. Thereupon it was hoisted by derrick and grab-hooks, and laid flat side down on a tram car, and pushed into the factory under the east rail of the crane. Then the foreman signaled plaintiff to move the stone from the car to a place about 150 feet north in the factory. He moved the crane to the stone, inserted the grab hooks in the places cut for them, and hoisted the stone to the height desired. The plaintiff had some difficulty in pushing the stone over towards the west rail of the crane, in which position it was to be moved north, because of an alleged defect in the apparatus near the center of the beams of the crane, and had to call another workman to his assistance. After plaintiff got the stone past this obstruction, the crane was by him started north and stopped at the place desired. As he was in the act of lowering the stone to the ground, a

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piece broke off of one corner, where the grab hook hole was, and the stone fell. In the fall, plaintiff, who stood near by, was caught between the stone and a pile of marble slabs, breaking his leg.

The negligence charged against defendant, and relied on in this appeal, relates to the defect in the stone where the hole was made for the grab hook, and to the obstruction to the rollers of the hoisting cable near the center of the supporting beams of the crane. The trial court was of the opinion that, if it was negligence to place the grab hook hole where it was placed because of the defect or unsoundness of that part of the stone, it was the negligence of a fellow servant, and also that there could be no inference that the mentioned defect in the crane in any manner caused the stone to break and fall.

The complaint alleged that the place for the grab hook holes was designated by defendant's foreman, Strom; that moving these large blocks of stone involved great danger to the men employed; and that defendant and its foreman and superintendent in this instance failed to inspect the stone and ascertain that the place where the grab hook hole was cut was rotten. It is self-evident that the handling of heavy blocks of stone by derricks, cranes, and other appliances is at all times fraught with danger. The giving way of any part of the instrumentalities used, or the part of the stone to which these are temporarily attached, means almost certain disaster to the men that happen to be near, or to the appliances used. The evidence is absolutely silent on the proposition that defendant, by Strom, or any other foreman or superintendent, designated, supervised, or inspected the placing of grab hook holes in the stone blocks handled in the yard or factory. No other conclusion can be drawn from the record than this:

That when there were no grab hook holes in the stones, or those placed in them at the quarries were not suitable for handling the stones in the yard or factory, the derrickmen or some other servants cut the holes where they deemed proper, and that these men who so cut the holes were experienced men, and knew where to place the holes, either from the size and shape of the stone when cut, or from knowledge of how the stone was to be cut, or else from markings made by the foreman, Strom, as to the manner in which the stone was to

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be cut up or dressed. The cutting of these holes was, therefore, a necessary detail of the work of dressing stone carried on by defendant, and can in no sense be held to be an instrumentality furnished by the master with which to do the work. The men selected the place to cut. They might select a weak place or a strong place in the stone, just as if there had been different kinds of grab hooks or chains provided for lifting, and the weaker had been selected instead of the stronger.

Furthermore, although the defendant's president testified to the fact that danger attends the work in the factory and the movement by machinery of heavy stone blocks, there is no evidence that the holes in this stone were not in the ordinary place, or that the stone was of an unusual size or weight, or that the grab hooks had ever before become detached because of defects in the stone or the holes, so there is nothing in the record upon which to predicate negligence in not inspecting the stones to determine a safe place for the grab holes. We conclude that providing these holes was a necessary detail in cutting and dressing the stones in this factory, which the master could place in the hands of competent servants, and, further, that the evidence fails to show that the proper placing of these holes was a work so dangerous, affecting the safety of the men in the factory, that the defendant owed them a master's nondelegable duty of inspection. The pleadings do not raise the issue of the competency of the derrickmen to select and cut these holes.

It is true that, even if defendant cannot be held for the negligence of plaintiff's fellow servant in placing the grabhook hole in a defective part of the stone, still, if it can be said that there was a debatable question on this record whether or not the alleged defect in the crane contributed in any manner to the accident, the case should have gone to the jury. See cases cited in 2 Dunnell, Minn. Digest, under section 5952. But we agree with the trial court that it would be so improbable a conjecture that the extra force which plaintiff and a fellow servant exerted in pushing the suspended stone over the alleged defect on the crane beams helped to break it that no verdict should be permitted to rest thereon. It is incredible that two men could so push a weight of 4,600 pounds suspended from a cable about

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10 feet long that any appreciable increased strain should come upon the grab hook holes by reason of any surging or swaying of the stone after the rollers on the crane passed the obstruction of the beam.

We are of opinion that the evidence fails to show any negligence as the proximate cause of the accident for which defendant is legally responsible.

Order affirmed.

WILLIAM C. RILEY v. MARY H. PEARSON.[1]

January 3, 1913.

Nos. 17,916—(237).

Easement.

A deed of real estate construed, and *held* to convey to the grantee an easement of a passageway over the land of the grantor, and that such easement was permanent, and not limited to the life of the building on the premises.

Registration of title — failure to disclose persons in interest.

Where, in proceedings under the Torrens act to register title, the applicant fails to disclose to the court the names of persons known to him to have an interest in or lien upon the property, and such persons are not named as parties to the proceeding or served with summons, and do not have actual notice of the proceeding, a judgment rendered therein is not binding upon such persons.

Evidence.

Applicant in the proceedings in question herein *held* to have known before the summons was applied for that her title was subject to permanent easements owned by persons known to her.

Collateral attack.

Such judgment, rendered without jurisdiction of the persons owning such easements, was void as to them, and may be attacked collaterally.

William C. Riley made application to the district court for Ramsey county to register title to certain real estate in block 26, St. Paul

[1] Reported in 139 N. W. 361.

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proper. In his report the examiner of titles mentioned that the westerly 41.06 feet of lot 8 in that block had been registered and that a certificate from the registrar of titles could be filed in the proceeding, so that all matters in relation to easements and rights growing out of agreements might be settled. Mary H. Pearson filed her answer, alleging that she was the owner in fee simple of the westerly 41.06 feet of lot 8 and her title had been duly registered. Daniel Aberle & Sons, a corporation, also answered, claiming a perpetual easement to the use of the arched alleyway in the rear of the building situated on the westerly 41.06 feet of lot 8, and praying that in any decree its rights be recognized and established. The matter was heard before Kelly, J., who made findings and as conclusion of law, among others, found that applicant and Daniel Aberle & Sons were entitled to a perpetual easement to the use of the arched alleyway and the land and space which constituted the arched alleyway in the rear of the store building on the westerly 41.06 feet of lot 8. From an order denying her motion for a new trial, Mary H. Pearson appealed. Affirmed.

William G. White, for appellant.

A. E. Horn, for respondent Riley.

Charles Bechhoefer, for respondent Daniel Aberle & Sons.

BUNN, J.

This is a proceeding under the so-called Torrens act to register the title to land in the city of St. Paul. A trial of the issues resulted in a decision that the applicant was entitled to have his title to the land, and to the easements referred to in the decision, registered in him. Defendant Mary H. Pearson moved for a new trial, and from an order denying such motion appealed to this court.

The questions presented here relate: (1) To the character and extent of the easements owned by plaintiff and defendant Daniel Aberle & Sons prior to the decree hereinafter mentioned; (2) to the effect of such decree on such easements. The material facts are as follows:

Alexander Paul, in his lifetime, was the owner of lots 8 and 9,

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block 26, St. Paul proper. He constructed upon this property a three-story stone building, divided into four separate stores. By his will Alexander Paul devised this property to his children, Charles Paul and Mary Paul, in equal shares. The will was probated in 1867, and the final decree, entered in 1881, assigned the property to the devisees named. Lots 8 and 9 have a frontage on East Third street of 116 feet, and a depth on Robert street of 150 feet. The store building covered the entire frontage of both lots on East Third street, but the division into stores was without any reference to lot lines. Store No. 1, located at the northeast corner of East Third and Robert streets, was constructed on the west 41.06 feet of lot 8. Stores numbered 2, 3, and 4 were located on the remainder of lot 8 and all of lot 9.

In 1881 commissioners appointed by the probate court to partition the estate of Alexander Paul filed their report, in which store No. 1 was assigned in severalty to Charles Paul, and stores Nos. 2, 3, and 4 were assigned in severalty to Mary Paul. In this report, which was confirmed by the court in April, 1881, and duly recorded, store No. 1, together with the land upon which it was located, was set off to Charles Paul, subject to the following easement:

"Subject to the right of use of the arched alleyway through the rear end thereof by the owners and occupants and their heirs and assigns of said stores two, three, and four in said block, for ingress and egress from the same into and from the yard room in the rear of said block, *so long as said building shall stand.*"

The arched alleyway mentioned in the report leads from Robert street to the "yard room" in the rear of stores 2, 3, and 4. Store No. 1 extends the full length of the lot, and this alleyway is a driveway under the second story, with its sides and arched ceiling of stone. It is 10 feet wide on the ground and 16 feet high at the highest point of the arch, and extends the full width of store No. 1 to an open space in the rear of the other stores, which do not extend to the rear of the parcels on which they stand.

Mary Paul died, and her undivided half interest in the property was assigned by the final decree entered January 26, 1888, to the devisees named in her will, Emma and William Paul. On the next day

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there was recorded a deed from Charles Paul and wife to Emma Paul and William Paul. This deed, dated in November, 1887, purported to convey to the grantees the three stores which had been set off to Mary Paul in the partition proceedings in 1881. In this deed the easement granted was described as follows:

"Together with the right of use of the arched alleyway in the rear of said most westerly store for ingress and egress to and from the yard room in the rear of the stores standing on said lots eight (8) and nine (9)."

The applicant, William C. Riley, and the defendant Daniel Aberle & Sons, have succeeded to the title and interest of Emma and William Paul in two of the stores and parcels of lots 8 and 9 which went to Mary Paul by the partition, Riley owning parcel No. 4 and Daniel Aberle & Sons parcel No. 3, and they are the present owners of the easements. Defendant Mary H. Pearson succeeded to the title of Charles Paul to parcel No. 1, on which store No. 1 and the arched alleyway stands.

The foregoing are the facts that bear on the question whether the easement of the applicant is permanent, or endures only so long as the building stands. The facts that bear on the second question are as follows:

On April 24, 1906, Mary H. Pearson filed in the district court of Ramsey county her application to register the title to the west 41.06 feet of lots 8 and 9, block 26. After the usual reference to the examiner of titles, the latter, on May 8, 1908, filed his report, in which he reported that the applicant was the owner of record of the land sought to be registered, subject to the easement granted by the deed of November, 1887, from Charles Paul, which easement the examiner stated "does not appear to have ever been extinguished." He recommended that the owners and persons in possession of the remainder of lots 8 and 9, covered by the store building, be made defendants in the proceeding. The applicant did not, however, apply for the issu-

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ance of a summons in which these owners and persons in possession were named as defendants. Nothing appears to have been done in the proceedings until October 24, 1906, on which day the examiner filed a supplemental report, in which he stated that the title should be registered subject to the right of use of the arched alleyway by the owners and occupants, their heirs and assigns, of the store building, "so long as said building shall stand," and stated that, if this were done, it would not be necessary to make the owners and persons in possession of the remainder of lots 8 and 9 defendants in the proceeding.

On the day following the filing of this supplemental report, the applicant applied for the issuance of a summons, and did not include among those to be named as defendants the owners of the remainder of lots 8 and 9 and the easement, who were, as before stated, William C. Riley and Daniel Aberle & Sons. Riley was at the time a resident of St. Paul, and Daniel Aberle & Sons was a corporation having its place of business and the residence of its officers in St. Paul. The summons was issued as applied for, and did not name as defendants either Riley or Daniel Aberle & Sons, and neither was ever served or notified of the proceedings. The summons was directed to certain named defendants, and to "all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the application herein." This summons was published as required by law, and the proceedings came on before the court, which made its decision finding that the applicant was the owner of the real estate described in the application, subject to the easement "so long as said store building shall stand," and directing the entry of judgment accordingly. Judgment was entered, which described the easement in the language of the findings, and ordered the register of titles to register applicant's title, subject to such easement and certain other incumbrances named. The title was so registered, and a certificate issued.

On these facts, the learned trial court decided that the applicant in this proceeding and defendant Daniel Aberle & Sons were the owners of a *perpetual* easement for a passageway through the arched

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alleyway, and that, not being parties to the Pearson registration proceeding, they were not bound or affected by the judgment in that proceeding, which declared their easement to be only "so long as said store building shall stand."

1. The first claim of appellant is that the easement is not perpetual, but continuous only "so long as the stone building shall stand." If the character of this easement is to be determined by the terms of the partition decree in the estate of Alexander Paul, this is correct; but if the character and duration of the easement is to be determined by the terms of the deed of November, 1887, from Charles Paul to Emma and William Paul, we think it clear that the easement was perpetual. The language will not admit of any other construction. The easement was to each grantee, and *to his "heirs and assigns forever,"* and was without limitation as to time. There is nothing to warrant the conclusion that if the building should be destroyed by fire, or cyclone, or torn down to make way for a new structure, it was intended that the easement should terminate. And we hold that we must determine the nature and duration of the easement from the terms of the deed of November, 1887.

It is urged that this deed was merely confirmatory of the partition decree entered six years before; but there is no suggestion why this decree needed confirmation, and no explanation of why, if it did, Emma and William Paul did not give a deed to Charles confirming his title under the decree to parcel No. 1. Apparently the partition proceedings were entirely effective to convey to Mary Paul a complete title to parcels 2, 3, and 4, and to Charles Paul an equally good, but no better, title to parcel 1. The deed of 1887 recited a consideration of $30,000, which is perhaps a fact not of great weight, but rather suggestive of something more than a mere desire to confirm the partition decree and strengthen the final decree, which on the day the deed was filed for record was entered in Mary Paul's estate, and assigned to the grantees in the deed the identical property it conveyed, if applicant's position is correct. It seems much more reasonable to conclude that it was intended by the deed to convey something that the grantee did not already own. A permanent easement in the owners of parcels 2, 3, and 4 would evidently be of much

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greater value than the one they already possessed, limited by the life of a building which might at any time be destroyed or torn down to be supplanted by a more modern structure.

We hold that the deed conveyed an easement, and that this easement was permanent, not limited, as was the one granted by the partition decree. It follows that the trial court correctly held that, at the date of the commencement of the Pearson registration proceedings, William C. Riley and Daniel Aberle & Sons each owned a perpetual easement for the use of the arched alleyway over the rear of parcel No. 1. It may be noted here that parcel No. 2 is owned by a defendant who did not appear in this proceeding, and that the owner of parcel No. 3 has also an easement of passage over the rear of parcel No. 2, and the owner of parcel No. 4 an easement of passage over the rear of parcels Nos. 2 and 3, as well as the right to use the arched alleyway. Each of these easements is, by the terms of the deed creating it, a permanent one.

2. The serious and important question in the case is whether or not applicant and Daniel Aberle & Sons are bound by the Pearson registration decree, which adjudged their easements to be limited by the life of the building. That this judgment was erroneous we have already held; but, of course, that is, in this connection, unimportant. If it is binding on applicant, he cannot now claim a permanent easement. The question is important, not only as it affects the validity of decrees under the Torrens law as against collateral attack, but as it affects owners of property which may be taken from them by legal proceedings of which they have no notice. We are anxious that a Torrens title be made one which will pass readily, without examination of the records to ascertain if the owner of the certificate had a title that was proper for registration, and without regard to that fact; but we are also anxious to announce no doctrine that will make it easy to deprive another of his property without an opportunity on his part to be heard. We conceive that considerations of public welfare do not demand that we "stretch the law" in order to sustain a Torrens title founded on a judgment rendered without due process of law.

The controlling facts, to which we must apply the law, are that, at the time the Pearson summons was applied for, William C. Riley

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and Daniel Aberle & Sons were the record owners of a perpeutal easement over the land sought to be registered, and were openly in the enjoyment of such easement. The applicant had both constructive and actual knowledge of this fact; the deed creating the easement being on record, the owners being in possession, and the examiner of titles, having, in his original report, found that an easement was created by the deed, and still existed, and having recommended that the owners of such easement be made parties defendant in the proceedings. Had there been no supplemental report of the examiner, suggesting that it was not necessary to make the owners of the easement parties, it could not be claimed that the decree would bind parties not joined or served, contrary to the recommendation in the original report. Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; Baart v. Martin, 99 Minn. 197, 204, 108 N. W. 945, 116 Am. St. 394. All that appellant has on which to base the argument that the judgment is binding is the statement in the supplemental report of the examiner that it would be unnecessary to join the owners of the easement if the decree registered the title subject to an easement limited to the life of the building.

Did this relieve the applicant from making parties to the proceeding the owners of an interest disclosed by the records and actually known by the applicant to exist? If this were not a Torrens law proceeding, if it were an action to quiet title, or to determine adverse claims, it would not for a moment be contended that the owner of a known lien or interest that appeared of record would be bound by a judgment unless he was made a party and served with the summons. But it is claimed that this is so under the Torrens law, or at least that such judgment binds everybody after the 60 days within which a person having an interest in the land and who has not been actually served with process may appear and file an answer. And we agree with this contention, except as we are asked to apply the rule to cases where the applicant has knowledge of the title, interest, or lien existing in another, and fails in his application or petition for summons, or otherwise, to disclose such knowledge.

In the absence of fraud, actual or constructive, it is the law, as declared by the act itself and the decisions, that a decree of registra-

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tion binds all the world. Those not specifically named as defendants are parties to the proceeding under the designation "all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the application herein," and served by publication. This is the effect of Baart v. Martin, supra, of Doyle v. Wagner, 108 Minn. 443, 122 N. W. 316, and of American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82. These cases, and especially the first named, appellant insists, control the case at bar, and compel the conclusion that the judgment in the Pearson proceedings is binding upon Riley and Daniel Aberle & Sons.

In Baart v. Martin the action was to foreclose a mortgage given by Martin to one Ernst and assigned to Baart. Ernst forged Baart's name to a power of attorney to foreclose the mortgage, and it was in form foreclosed, though there was no default in the mortgage. At the sale the property was bid in in the name of Baart, and thereafter Ernst forged Baart's name to a deed conveying the property to one Carl. Carl, though having knowledge of these facts, on December 15, 1903, made application to register title to the land under the Torrens law, which application was filed January 23, 1904, and referred to the examiner January 29, 1904, who reported an unincumbered fee title in Carl. Baart had no knowledge of the forged power of attorney, the attempted foreclosure, or forged deed until in November, 1903. On January 2, 1904, he commenced the action to foreclose his mortgage. The summons was served on Carl February 7, 1904, and a notice of lis pendens filed on March 3, 1904. March 5, 1904, Carl elected to proceed with his registration proceedings, and the summons was issued, served, and published. Though Carl then knew that Martin was the owner of the fee, and that Baart owned an unsatisfied first lien on the property, neither Martin nor Baart was named as a defendant in the proceedings, which resulted in a decree registering the title in Carl as fee owner and not mentioning Baart's mortgage. On these facts it was held that, as Carl knew that Baart claimed a mortgage lien on the land, it was necessary that the latter's name appear in the summons, and that, as he was not an "unknown party," the concealment of his claim is

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a fraud on the court, and "the decree therein entered is as to him of no force and effect."

The conclusion that the decree was not binding on plaintiff because of the "fraud on the court" involved an exhaustive review of the authorities on the effect of a Torrens decree under the laws of different states and countries, and a decision that under our statute a decree and certificate procured by fraud, when the owner of the land is not notified as required by the statute, may be vacated and set aside, as long as the title remains registered in the name of the person guilty of the fraud, in an action brought by the defrauded party within a reasonable time after the discovery of the fraud. In other words, a decree and certificate so obtained by fraud do not give an indefeasible title. It is true that it was stated in the opinion that the purpose of the Torrens law was to create an indefeasible title in the person adjudged to be the owner, and that in the absence of fraud a Torrens decree is final and we have no intention or desire to in any respect depart from this doctrine. But we by no means regard the case as conclusive in favor of appellant here. Indeed, it supports the position of respondent.

Doyle v. Wagner was an action to foreclose a mechanic's lien, in which the defense was a decree registering the title under the Torrens system. The lien statement was filed before the registration proceedings were begun; but, owing to a mistake in the description of the property, it was not noted on the abstract or mentioned in the examiner's report, and the trial court found as a fact that the applicant at no time had any notice or knowledge of the existence of the lien. It was held that, the registration proceedings being regular, and there being no fraud, plaintiff was bound by the decree, though not named as a party, and though the decree did not recognize or establish the lien. It is clear that this case does not control the case at bar.

In American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82, the Federal Supreme Court had under consideration the validity of a statute of California, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records."[1] This statute was

[1] Cal. St. (Ex. Sess.) 1906, p. 78.

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passed at an extraordinary session of the legislature of California, called after the earthquake and fire in April, 1906, and its object was to restore the record title to land in San Francisco, where the records had been destroyed by the great calamity. The act permitted an action by one in possession of property to establish his title. It required the plaintiff to make affidavit before the summons was issued that he does not know and has never been informed of any adverse claimants not named in the summons. It was held that this law did not deprive unknown claimants of their property without due process of law. The statute had been construed by the Supreme Court of California in Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L.R.A.(N.S.) 682, 119 Am. St. 199, and in Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939, as requiring the complainant "to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants," a construction which was said by Chief Justice White "in effect declared that the statute prohibited the omission of a known claim or claimant upon the conception that the rights of such claim or claimant would be foreclosed by the general designation and notice prescribed for unknown claimants." This construction enabled the court to hold the act constitutional, as, when so construed, it manifested "the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants, and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested."

It is apparent that the Zeiss case is no authority for upholding a decree where a *known* claimant is omitted from the summons and not served. Indeed, the reasoning of the opinion seems to indicate quite clearly that such a decree would not be binding upon the claimant omitted. The Chief Justice quotes from Hoffman v. Superior Court the statement that "failure of the plaintiff to make inquiry, or to avail himself of knowledge which would be imputed to him because of facts sufficient to put him on inquiry as to the existence of adverse claims, would be available in any subsequent attack upon

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the decree, upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction." That this language met the approval of the court in the Zeiss case is evident. And in discussing the "adequacy of the proceedings pursued" in the Zeiss case it was stated that there was no claim that fraud, actual or constructive, was employed by Zeiss in obtaining the judgment complained of; in other words, Zeiss had no knowledge of the existence of adverse claims or claimants.

The cases we have above discussed do not hold that a registration decree is indefeasible when a known claimant is omitted from the summons, is not served, and has no notice of the proceedings; and we are aware of no case so holding. On the contrary, Baart v. Martin expressly holds that "when the name of a claimant is known to an applicant, either from the report of the examiner, *or from other sources,* the summons cannot be served on such claimant by publication, unless his name appears in the summons," and that "the concealment of his claim is a fraud on the court, and the decree therein entered is as to him of no force and effect." The other cases referred to, by necessary implication, announce the same doctrine. Indeed, no other conclusion seems possible under the language of the act requiring the applicant to set forth in his application the names of all parties who "appear of record or are known to the applicant to have or to claim any right, title, estate, lien, or interest in the land," and requiring the order for summons to contain the name and address, so far as known, of every person named in the application or found by the examiner as having any such right, title, interest, estate, or lien. State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. 571; Ware v. Easton, 46 Minn. 180, 48 N. W. 775; Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

We do not understand counsel for appellant to question this. He admits that, if the applicant fails to disclose to the court the existence of a claim or claimant known to him, this is a fraud upon the court, and that the decree may be set aside in a direct action for that purpose. But he claims that it is not shown that the applicant knew of the easements claimed by Riley and Daniel Aberle & Sons,

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and that in any event there must be a direct action to set aside or modify the decree.

3. It may be that Mary Pearson had no actual personal knowledge of the duration of the easements claimed. But her attorney had. He may have considered that legally the easements were not permanent, but he knew all the facts, or at least is charged with such knowledge—the examiner's first report, the deed of record, the fact of possession, if it may be so called. Clearly the applicant is charged with the knowledge acquired by her attorney. It is not clear why the recommendations in the original report were not followed, why the supplemental report was made, or what influenced the examiner to change his opinion. But certainly the astute and able counsel knew every fact relating to the claims of the owners of parcels 2, 3, and 4, and it is immaterial if he still considered that the easements continued only so long as the store building should stand. We do not believe for a moment that there was any intent to commit a fraud on the court. The high character of the counsel is sufficient evidence to rebut any inference that might otherwise be drawn from the facts. But such actual intent of purpose to defraud the claimant is not necessary. We think that constructive fraud is sufficient, and that the omission to disclose the adverse claims was such a fraud upon the court. The use of the term "fraud" in this connection is perhaps unfortunate, naturally implying, as it does, moral turpitude and bad faith. It is the fact itself that a known claimant was not made a party or served that makes the judgment not binding upon him, rather than any bad faith in concealing the existence of the claim or claimant.

It is insisted that the applicant disclosed to the court all the facts upon which the character of the easement depended, including the deed by which it was created. It is certainly true that the first report of the examiner disclosed this deed, and that it was referred to in the abstract. But it may be noted that this information did not come from the applicant, and we are not prepared to hold that the fact that it was possessed by the court, or, more accurately, that the facts were disclosed in the files of the case, relieved applicant of the duty of doing anything further to disclose the names of claim-

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ants. The fact still remains that neither in the application, nor in the petition for the summons, was any mention made of the easements claimed by Riley and Daniel Aberle & Sons. It is, of course, the duty of the court to determine what parties shall be named as defendants in a registration proceeding; but it is not to be expected that the court can or should do this without the aid of the applicant and the examiner. Had the applicant disclosed the fact that the deed granted a perpetual easement, and that Riley and Daniel Aberle & Sons were the record owners of such easement, in the actual enjoyment thereof, all facts within the applicant's knowledge, it would not be necessary now to claim that the court, not the applicant, was responsible for the failure to name the owners in the summons.

4. It is strenuously insisted that the decree is binding in any event until set aside or modified in a direct proceeding brought for such purpose. This would clearly be true in case of fraud that did not go to the question of the jurisdiction of the court over the parties. But this is a case where, as we have held, the court never acquired jurisdiction over the persons who are now insisting that the decree is not binding upon them. And this want of jurisdiction appears affirmatively from the judgment roll itself. The rule applicable to such a case is well settled; that is, such a judgment is a nullity as to those not parties to it, and may be attacked collaterally. Kanne v. Minneapolis & St. L. Ry. Co. 33 Minn. 419, 23 N. W. 854; Jewett v. Iowa Land Co. 64 Minn. 531, 67 N. W. 639, 58 Am. St. 555; 2 Dunnell, Minn. Digest, § 5141. We see no reason why this rule should not apply to a judgment in a Torrens proceeding, as well as in any other action.

We fully agree that a Torrens certificate, based upon a decree in a proceeding in which the law as to naming and serving known claimants is complied with, gives, in the absence of fraud, an indefeasible title, and is not merely evidence of the title which the applicant had before the decree. All claimants unknown to the applicant, and not named in the examiner's report, are parties to the proceeding as "unknown parties;" but where it affirmatively appears that claimants known to the applicant or named by the examiner are not made parties, the decree is not binding on such claimants, and may be

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attacked collaterally. Any other conclusion would go far to remove the safeguards which make the law constitutional. It would make a strong argument for holding that the act was invalid, because the proceedings provided do not constitute due process of law. In its last analysis the case reduces itself to the plain proposition that no man can be deprived of his property without notice and an opportunity to be heard. We may call the attempt to do this fraud, or we may say it was a mistake; but the result is the same—a judgment claimed to be binding against known owners of an interest in the land, who were not made parties or served with summons, and who had no actual notice of the suit.

We have considered very carefully the able arguments and briefs of counsel, and our conclusions are in harmony with those reached by the trial court.

Order affirmed.

GILBERT T. HOFF v. NORTHWESTERN ELEVATOR COMPANY.[1]

January 3, 1913.

Nos. 17,927—(221).

Notice of trial — service by mail.

Service of notice of trial by mail is complete when the notice is properly mailed.

Service by mail.

When a paper served by mail actually comes to the hands of the person to be served within the time required for personal service, the service is good, though the mailing was after the time prescribed by law.

Opening judgment — no abuse of discretion.

The trial court did not abuse its discretion in refusing to set aside a judgment on account of excusable neglect of defendant's attorneys.

Appeal by defendant from an order of the district court for Grant county, Flaherty J., denying its motion to vacate a judgment entered

[1] Reported in 139 N. W. 153.

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in the action and discharging an order to show cause why the writ of execution should not be quashed and the levy made by the sheriff of that county under the writ be discharged. Affirmed.

Van Derlip & Lum, for appellant.

E. J. Scofield, for respondent.

BUNN, J.

This is an appeal by defendant from an order of the district court for Grant county denying a motion to set aside a judgment entered by default in favor of plaintiff.

The facts are these:

The action was commenced November 21, 1911, to recover $548 and interest for labor claimed to have been performed by plaintiff for defendant. December 11, 1911, defendant served its answer, a general denial with an additional defense. Plaintiff served a reply to this answer early in January, 1912, and the issues were then ready for trial. On May 18, 1912, plaintiff's attorney made and filed an affidavit to the effect that on February 14, 1912, he served on defendant's attorneys by mail a notice of trial for the June term of the court. The case was placed upon the calendar for that term, and was reached in its order June 5, 1912. Defendant not appearing, plaintiff waived a jury trial, the case was tried to the court, and a decision filed in favor of plaintiff. Notice of taxation of costs was given for June 12, 1912, and served on defendant's attorneys by mail June 9. On receipt of this notice on June 10 defendant's attorneys wrote to plaintiff's attorney, acknowledging the receipt of the notice, and expressing surprise, "inasmuch as no notice of trial in this action has ever been served upon us." They asked that plaintiff's attorney investigate the facts in regard to the notice of trial, and, if found to be as they stated, suggested a stipulation setting aside the order for judgment. June 13 plaintiff's attorney replied, stating that the case was duly noticed for trial in February, and that he expected to be in Minneapolis to-morrow. June 15 defendant's attorneys wrote to the attorney for plaintiff, reiterating that they had received no notice of trial, and stating that they would be pleased to hear from him further

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in relation to an arrangement to enable the case to be tried upon its merits, and that, "awaiting further advice from you, will take no steps toward applying to open the judgment." Plaintiff's attorney did not reply to this letter, and on June 24 defendant's attorneys wrote again, asking the status of the case. They received no reply. The judgment had been entered on June 12, and an execution issued, which on August 14 was levied on personal property of defendant. On August 15 notice of this motion to set aside the judgment was served.

1. Defendant's first contention is that it appears conclusively from the record that no notice of trial was served. But the most that can be said of the evidence is that it tends to show that the notice was not received by defendant's attorneys, as the proof that the notice was duly mailed at the place of residence of the party making the service is abundantly sufficient to justify a finding to that effect. It is urged that the rule should be that the proof of mailing a notice is prima facie evidence of its receipt by the adverse party, but that the service is not complete until the notice is actually received. We do not sustain this contention. The rule announced in Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381, is that, when the paper is properly mailed the service is complete; the risk of failure of the mail is on the person to whom it is addressed. We follow this rule. It is supported by the authorities, and is sound. We therefore hold that it was not shown that the notice of trial was not served, and the finding that it was, necessarily implied from the order refusing to vacate the judgment, is sustained by the evidence.

2. It is claimed that defendant was entitled as a matter of right to have the judgment set aside, because the postmark on the envelope inclosing the notice of taxation of costs was June 9, thus showing a mailing one day too late. But the evidence is conclusive that defendant's attorneys actually received the notice on June 10, and that was equivalent to personal service on that date. Van Aernam v. Winslow, supra. And no notice was necessary to a valid entry of the judgment.

3. It was within the discretion of the trial court to grant the motion on the ground of justifiable inadvertence or excusable mistake on

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the part of defendant's attorneys; and this discretion is not to be exercised arbitrarily, but is a sound legal discretion, an abuse of which may be corrected by this court. While a trial court should ordinarily grant the relief upon any reasonable showing that the neglect was justifiable or excusable, in this case we think there was no abuse of discretion. Defendant's attorneys did not act promptly after discovering that the case had been tried, and there does not seem sufficient excuse in the correspondence or in the affidavits to justify the delay. This fact, considered with the other evidence before it, may well have led the trial court to believe that justice would be best served by a denial of the motion.

Order affirmed.

A. C. WILSON v. ROBERT BLACKWOOD.[1]

January 3, 1913.

Nos. 17,931—(136).

Statute of limitations — application of credit — evidence.

Evidence *held* sufficient to justify a finding that a sum of money in the hands of plaintiff as the proceeds of property sold for defendant was applied, with defendant's consent, as part payment of an overdue account held by plaintiff against him, and that such application tolled the statute of limitations and prevented the bar of plaintiff's cause of action for the balance due on the account.

No prejudicial error.

The record presents no reversible errors.

Action in the district court for Morrison county to recover $587.26. The facts are stated in the opinion. The answer pleaded payment

[1] Reported in 139 N. W. 151.

Note.—On the question of revival of barred debt by application of general payment, see note in 13 L.R.A.(N.S.) 1141.

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and the statute of limitations. The case was tried upon the testimony taken before a referee, before Taylor, J., who made findings and ordered judgment for the sum of $479.67 in favor of plaintiff. Defendant's motion to amend the findings of fact and conclusion of law was denied. From an order denying a new trial, defendant appealed. Affirmed.

Benton, Molyneaux & Morley, for appellant.

C. Rosenmeier, for respondent.

BROWN, J.

The complaint in this action contained two separate causes of action, one in favor of plaintiff personally, and the other in favor of A. C. Wilson & Co., a copartnership, of which plaintiff is the surviving partner. The first cause of action was in favor of Wilson & Co. for goods sold and delivered; the second, in favor of plaintiff personally for goods sold. The evidence was taken before a referee, and the cause was thereafter, on stipulation, submitted to the court upon the evidence so reported. The court found the second cause of action barred by the statute of limitations, but ordered judgment for plaintiff on the first, or the cause of action in favor of Wilson & Co. Defendant subsequently moved for a new trial, and appealed from an order denying the same.

1. The principal question on this appeal is whether the cause of action on which recovery was allowed was at the time of the commencement of the action barred by the statute of limitations. Our examination of the record leads to the conclusion that the findings of the trial court are supported by the evidence and cannot be disturbed. It appears that the firm of A. C. Wilson & Co. was composed of plaintiff, A. C. Wilson, and his father, Isaac P. Wilson. The latter died long before the commencement of the action, leaving plaintiff the sole surviving partner. The copartnership was never dissolved, except by the death of the member stated, and his estate has never been probated. Between May 5, 1898, and June 18, 1904, the firm sold and delivered goods and merchandise to defendant of the value, in the aggregate, of $454.07, and during the same period loaned defendant at different times the sum of $245.23, making a total indebtedness of

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$719.30, no part of which has been paid, except the sum of $239.63. The payments were made on different dates, the last two of which, as appears from the account book of the firm, were on April 27, 1908, and April 30, 1908.

The question whether the account is barred centers about these payments. If they were not made, or if made, were improperly credited upon this particular account, the account is barred, for without these payments it was six years overdue when the action was commenced. It appears from the record, and the trial court was justified in so finding, that at about the date of the two payments referred to defendant delivered to plaintiff a certain quantity of oats to be sold and accounted for; that the oats were sold, and the proceeds credited upon the account. While it does not appear that the oats were originally delivered to plaintiff with the purpose that the proceeds should be so applied, it does sufficiently appear, from plaintiff's evidence, that after the sale of the oats defendant consented to their application upon this indebtedness. Plaintiff then held two accounts against defendant, his individual claim, and the account due the firm. Defendant gave no directions upon which of the two the money should be applied. The plaintiff applied the amount upon the Wilson & Co. account, which was not then outlawed; his personal claim being at the time barred by the statute. Defendant denied that he so consented, and denied, further, that he delivered the oats to plaintiff at all, claiming that they were delivered to one George Wilson, a brother of plaintiff, and that the mother of George paid for them. Defendant also denied that Wilson & Co. had an account against him.

The evidence presented a square conflict upon vital questions in the case and the court resolved them against defendant. We find no sufficient reason for disapproving the conclusion of the trial court. The facts as found bring the case within the rule that where a payment is made to a creditor having several distinct claims, not then barred by the statute, and no directions are given by the debtor to apply it upon any particular claim, the creditor may apply it upon any one of the claims, and such application will interrupt the running of the statute from the date of the payment. Anderson v. Nystrom, 103 Minn. 168, 114 N. W. 742, 13 L.R.A.(N.S.) 1141, 123 Am. St. 320,

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14 An. Cas. 54. Plaintiff testified that he stated to defendant that the proceeds of the oats would be applied upon his "old account," and that defendant gave his consent. This defendant denied. It was for the trial court to determine the truth in this respect, and also whether the parties then had in mind the old Wilson & Co. account. In any event, if the defendant consented to the application upon his indebtedness, without directions as to which, plaintiff had the right, under the authorities, to apply it upon the claim not then barred by the statute, which was the Wilson & Co. account.

2. The other questions presented do not require special discussion. There was no abuse of discretion in permitting plaintiff to amend his complaint, nor error in any of the rulings upon the admission of evidence. The evidence sustains the findings, and the order appealed from must be affirmed.

Order affirmed.

HOLDEN & WHEELING MUTUAL FIRE INSURANCE COMPANY v. CHICAGO GREAT WESTERN RAILROAD COMPANY.[1]

January 3, 1913.

Nos. 17,937—(231).

Defect of parties — objection to evidence.

An objection to the introduction of any evidence, on the ground that there is a defect of parties, in that plaintiff is only a part owner of the cause of action, was properly overruled, since such an objection must be taken by demurrer or answer, and in either case the pleading must point out the person claimed to be a necessary party.

Verdict sustained by evidence.

The evidence sustains the verdict that the fire which caused the loss was set by sparks from defendant's locomotive.

[1] Reported in 139 N. W. 157.

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Action in the district court for Rice county to recover $1,670, the amount paid by plaintiff on account of loss from fire alleged to have been set by the negligent operation of defendant's locomotive and by reason of its defective character. The answer specifically denied that the property was destroyed by reason of any negligent act of defendant and that the fire was communicated from defendant's engine. The reply denied the allegations of new matter in the answer. The case was tried before Childress, J., and a jury which returned a verdict for the amount demanded. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Briggs, Thygeson & Everall and *Charles W. Weyl,* for appellant.

P. H. O'Keefe, for respondent.

HOLT, J.

Ernst Schuette's dwelling house, located within 25 feet of the railway tracks of the defendant, where its line passes in a southwesterly direction from Dennison to Nerstrand, in this state, was, together with granary, some grain, and other property, destroyed by fire claimed to have been started by a freight train which passed at about 4:45 a. m. on March 24, 1911. Plaintiff had insured the house and property of Schuette against fire, and after the loss adjusted the same, paying him $1,670 and taking a formal assignment of the cause of action he had against defendant to the extent of the amount paid by it. Thereupon plaintiff brought this suit and recovered a verdict for the amount paid Schuette. The motion of defendant for judgment or a new trial being denied, it appeals.

The defendant objected to the introduction of any evidence, for the reason that it appears from the pleadings that plaintiff had paid but a portion of a fire loss and taken an assignment of but a portion of a cause of action, and that plaintiff is not the proper party plaintiff. The court overruled the objection. This is one of the errors assigned. The trial court was right.

The complaint did not show a partial assignment of a cause of action, or defect of parties plaintiff or defendant. If it had, the objection should have been taken by demurrer. Neither was it taken by

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answer. Therein the incorporation of plaintiff and defendant was admitted; the fire, its cause, the ownership of the property destroyed, its insurance by plaintiff, the adjustment of the loss, and the assignment of the cause of action by the owner to plaintiff, was put in issue; then followed allegations of negligence on the part of the owner which caused the fire; and the only other averment in the answer is this:

"Further answering said complaint, defendant alleges that said plaintiff has no right or legal capacity to sue in this case, and that the facts stated in said complaint do not constitute a cause of action."

It is obvious that the answer does not present the defense urged now, namely, that the insured should have been made a party, for the rule is that, where the answer sets up in abatement defect of parties, it must name the party omitted. Jones v. City of Minneapolis, 31 Minn. 230, 17 N. W. 377; Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748. The pleading did not show that any other person than plaintiff had any interest in the cause of action; neither does it appear from the evidence that any one else makes such claim.

The only question submitted to the jury was whether the freight train which passed the dwelling of Schuette at about 4:45 in the morning in question set the fire. When this train passed, no light or fire was seen at the house; but within a half hour thereafter Schuette and his wife noticed smoke in the house, and, going outside, found the fire burning in the horse manure with which the side of the house next to the track had been banked, and it had also communicated to the wall of the building. There was positive testimony of these parties that no fire or light was used in the house that morning, all being in bed; that it was an isolated farmhouse, standing very close to the track of the defendant; that a strong wind was blowing from the track toward the building; that the freight train which passed had a heavy load pulled by two locomotives; and that there was a considerable upgrade in the direction the train was going, causing sparks to be emitted more readily than on the level or downgrade. Upon this testimony it is readily seen that the jury was

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fully warranted in finding that sparks from these locomotives started the fire in the straw or manure of the banking of the house and caused the loss. The only evidence from which a contrary inference might be drawn was given by the train crew of a second section of a freight train, which followed the first mentioned in about an hour thereafter. This crew claimed that when they went by the fire appeared to be in the cellar or basement, although they admitted that Mrs. Schuette was pulling away the banking and Mr. Schuette was cutting a hole in the siding next to the banking to get at the fire in the wall. The issue as to the cause of the fire was clearly for the jury. We cannot disturb the verdict approved by the trial court. Upon no other issue was there any conflict in the evidence.

Order affirmed.

FRANK WALSON v. DAVID McGREGOR and Others.[1]

January 10, 1913.

Nos. 17, 1770–(131).

Control of construction train — fellow servants under law of Washington — contributory negligence.

Plaintiff, a brakeman on a train consisting of an engine and dump cars used by defendants in construction work in the state of Washington, was injured by the derailment of the train. One of the charges of negligence was that the engineer operated the train at an excessive rate of speed, thus causing the accident. It is *held:*

1. Under the law of Washington, as proved by the decisions of the highest court of that state received in evidence at the trial, the engineer and plaintiff were not fellow servants, if the engineer was in control of the train and vested with authority to control the movements and its rate of speed.

2. The evidence was sufficient to warrant submitting to the jury the question whether the engineer was so in control of the train, and to sustain a verdict that he was.

[1] Reported in 139 N. W. 353.

Note.—The conflict of laws as to fellow-servant rule is the topic of a note in 56 L.R.A. 219.

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3. It was not conclusively shown that plaintiff was guilty of contributory negligence, and the verdict is sustained by the evidence on this point.

Action in the district court for Benton county to recover $20,000 for personal injuries. The substance of the pleadings will be found in the third paragraph of the opinion. The case was tried before Taylor, J., and a jury which rendered a verdict for $1,750 in favor of plaintiff. From an order denying a new trial, defendants appealed. Affirmed.

J. D. Sullivan, for appellants.

Samuel A. Anderson and *Harry J. West,* for respondent.

BUNN, J.

This is a personal injury action, in which plaintiff recovered a verdict. Defendants appealed from an order refusing a new trial.

The facts necessary to understand the questions raised by the assignments of error are as follows:

Defendants, a copartnership, were engaged in railroad construction work in the state of Washington. They operated a steam shovel, and used dump cars hauled by "dinkey" engines to convey the earth from the pit over temporary tracks to the dump. There were two trains of these dump cars, each hauled by an engine. Plaintiff was a brakeman on one of the trains, and it was his duty to give signals to the engineer as to starting and stopping the train. The engineer had sole charge of the engine, and was fireman as well as engineer. He and the brakeman constituted the crew, there being no conductor. The brakeman sometimes rode on the engine, and sometimes on the loaded or empty cars, as suited his convenience in the performance of his duties. At the time of the accident, the engine, as it was hauling the cars from the dump to be reloaded at the pit, became derailed, and plaintiff, who was riding on the footboard, received the injuries complained of.

In the complaint three grounds of negligence were alleged: (1) Defective condition of the engine; (2) improper condition of the

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track at the point where the derailment occurred; and (3) negligence of the engineer in running his engine at an unusual and excessive rate of speed. It was alleged that under the common law of the state of Washington, as interpreted by the decisions of the highest court in that state, the engineer and plaintiff were not fellow servants, but that the former was a vice principal, and that defendants were responsible for his negligent acts or omissions. The answer denied any negligence in respect to the condition of the engine or the track, alleged that plaintiff and the engineer were fellow servants, and that plaintiff was guilty of negligence in riding on the footboard of the engine.

The case was submitted to the jury on all three grounds of negligence. No claim is made here in relation to the issues of unsafe track or engine. Defendant's contentions on this appeal are: (1) That, under the law of Washington, plaintiff and the engineer were fellow servants; (2) that plaintiff was guilty of contributory negligence as a matter of law.

1. If defendants are correct in their contention that under the common or decision law of Washington plaintiff and the engineer were fellow servants, the trial court erred in submitting this ground of liability to the jury, as it is clear that under our decisions declaring the law on the subject plaintiff and the engineer were fellow servants. If, however, the accident occurring in Washington, the law of that state would sustain a recovery by plaintiff for the negligence of the engineer, it was not error to submit this issue to the jury. Plaintiff introduced in evidence, to prove the law of Washington, the following decisions of the Supreme Court of that state: Hammarberg v. St. Paul, 19 Wash. 537, 53 Pac. 727; Howe v. Northern Pacific, 30 Wash. 569, 70 Pac. 1100, 60 L.R.A. 949; Grout v. Tacoma, 33 Wash. 524, 74 Pac. 665; Morrison v. Northern Pacific, 34 Wash. 70, 74 Pac. 1064; Mullin v. Northern Pacific, 38 Wash. 550, 80 Pac. 814; Durante v. Great Northern, 64 Wash. 395, 116 Pac. 870. Defendants offered no evidence on the subject.

The trial court instructed the jury as follows:

"If the engineer was in control of the train, and vested by the

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defendants with authority to control its movements and the rate of speed, and the engineer negligently ran the train at an excessive and dangerous rate of speed, the defendants are responsible for such negligence on the part of the engineer. But, if the engineer was not vested with authority to control the movements of the train, and to determine the rate of speed at which it should be operated, and if the authority to control such movements and to determine such rate of speed was exercised by some one else, as by the brakeman, or by Mr. McGregor, then the defendants are not responsible for any negligence on the part of the engineer."

We think that the decisions received in evidence declare the law of Washington as stated in the above instruction. It is the controlling and directing power and authority given by defendants to the engineer which determines whether he is the alter ego of defendants, or a fellow servant of the brakeman. If the engineer was in control of his train to such an extent that he was permitted to order its movements, he was a vice principal. Morrison v. Northern Pacific, supra. In that case it was held that an engineer of a train which collided with another train upon which the plaintiff was a brakeman was not necessarily a fellow servant of the brakeman. In Grout v. Tacoma, supra, it was held that a brakeman and a conductor on a construction train were not fellow servants. In all the cases received in evidence, the doctrine of "controlling influence" is applied.

We are asked to consider certain decisions of the supreme court of Washington that were not received or offered in evidence at the trial, not as evidence of the law of Washington, but as bearing upon the legal interpretation of the decisions in evidence. We do not think we can consider these decisions for any purpose.

2. Defendants urge that there was no evidence that the engineer was in control of the train, so as to make him a vice principal under the Washington decisions. But an examination of the record convinces us that this question was for the jury. Certainly the engineer had sole control of the train as far as the question of speed was concerned. The brakeman had no voice in the management of the engine or the train, except that he gave signals to start and stop.

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He was not a conductor. We conclude that this question was for the jury, that it was properly submitted in the charge, and that the evidence sustains the verdict on this point.

3. We are unable to hold that it was contributory negligence as a matter of law for plaintiff to ride on the footboard of the engine. The evidence tended to show a custom of riding upon these footboards, and whether plaintiff had been instructed not to so ride was a question upon which the evidence was in conflict. We cannot say that it was so dangerous as to conclusively show want of ordinary care on the part of the brakeman engaged in the performance of his duties. We hold, also, that the evidence fairly sustains the verdict finding that plaintiff was not negligent.

Order affirmed.

Heard before HALLAM, J., took his seat.

FITZPATRICK BUILDING COMPANY v. JOHN A. HEALY.[1]

January 10, 1913.

Nos. 17,784—(127).

Construction of contract.

Where F., doing business as a building company, contracted with the defendant to furnish certain material and labor for a building, the price thereof to be applied upon a debt due from F. to a firm of which the defendant was a member, and subsequently the building company was incorporated, and the corporation actually furnished such material and labor, but the defendant had no notice or knowledge of such facts, the defendant could not be held liable to the corporation, either for the material and labor so furnished, or for material and labor furnished pursuant to a similar contract executed subsequently to the plaintiff's incorporation, but likewise without notice to or knowledge by the defendant that he was not still dealing with F., or for extras furnished by the plaintiff under the same circumstances.

Question for jury.

The question of the making of the agreement between the defendant and

[1] Reported in 139 N. W. 495.

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F., and the question as to whether the defendant had notice or knowledge of the matters subsequently occurring, or of the fact that the material and labor was actually furnished by the plaintiff, *held*, under the evidence, for the jury.

Action in the district court for Ramsey county to recover a balance of $488.20 alleged to be due upon certain contracts. The answer denied defendant made any agreement with plaintiff and alleged an agreement with Mark Fitzpatrick and the Fitzpatrick Building Company for the remodelling of a building for the sum of $1,068, with an express agreement that no payment in cash was to be made by defendant, but that the indebtedness of Mark Fitzpatrick to the Healy Plumbing & Heating Company should be reduced to the extent of that price and of the value of all extra work and material furnished; that Mark Fitzpatrick and the building company failed to complete the work and defendant was compelled to pay for labor and satisfy liens to the extent of $802.03. The reply set out the facts concerning the execution of the trust agreement mentioned in the opinion, specifically denied that the Fitzpatrick Building Company was indebted to defendant or to the Healy Plumbing & Heating Company, and that Mark Fitzpatrick or the building company ever agreed that the indebtedness of Thomas Fitzpatrick & Son or Mark Fitzpatrick should be reduced in any amount whatever. The case was tried before Hallam, J., and a jury which returned a verdict in favor of defendant. From an order denying a new trial, plaintiff appealed. Affirmed.

Goddard & Cahill, for appellant.

Kennedy & Kennedy, for respondent.

Philip E. Brown, J.

Prior to December 30, 1907, Thomas Fitzpatrick and his son Mark were copartners engaged in contracting and building under the name of Fitzpatrick & Son. On that date Thomas died. The firm was then indebted in the sum of more than $6,000 to the Healy Plumbing & Heating Company, a copartnership of which the defendant was a member, for the whole amount of which Mark was liable. Mark continued the business of the firm at the same place

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under the name of Fitzpatrick Building Company. In February, 1908, Mark became embarrassed financially. His creditors were called together, and it was determined that he should turn over his properties to a trustee, to be disposed of for the purpose of liquidating his debts. This agreement was executed on March 12, 1908. The contract is not set out in the record, but it appears that the substance of two of its provisions was as follows: The creditors extended the time of payment of their claims for two years from the date of the agreement, and agreed to look to Mark alone for any balance remaining unpaid thereon after the trust property had been exhausted, and to receive and apply sums paid by Mark on their several claims. The evidence also established that the firm of which the defendant was a member was a party to this agreement. Thereafter the business of the building concern was continued at the old stand. Mark's cousin, William McGuigan, had been employed by Fitzpatrick & Son for many years, and continued in Mark's employment after the death of Thomas.

A building partially constructed, and which was a part of Mark's assets, went into control of the trustee. It was arranged between the parties to the trust agreement, however, that the defendant's firm should take this building for a portion of its claim, and should complete the same. Thereafter, and on August 21, 1908, the Fitzpatrick Building Company and the defendant entered into a written contract, in which the former agreed to perform certain specified labor and furnish certain materials in finishing the building, for the sum of $750. This contract was signed "Fitzpatrick Building Co., per M. J. Fitzpatrick."

On August 26, 1908, Mark, McGuigan, and Elva A. MacLeod, a stenographer who had been employed in the office of the building company, executed articles of incorporation of the business in question, under the name of "Fitzpatrick Building Company," and such articles were duly recorded on the same day; Mark being made a director and the president of the corporation.

On September 23, 1908, the Fitzpatrick Building Company and the defendant entered into a written contract of like tenor and effect to the one theretofore entered into by the defendant for the furnish-

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ing of labor and material for the building, signed by the building company, in the same manner as the former contract; the consideration being $318. Neither of the contracts contained any provision as to when the work was to be completed, nor when or to whom the consideration was to be paid. The labor and materials called for by these two contracts were supplied, and extra labor and materials were also furnished in the sum of $222.23. It is conceded that the defendant is entitled to a credit on the several sums stated in the sum of $802.03, all except $250 thereof having been advanced by the defendant to avoid mechanics' liens. The plaintiff in this action seeks to recover the balance, namely, $488.20.

The action was tried to a jury, who returned a verdict for the defendant. Thereafter, on April 13, 1912, judgment was rendered for the defendant. On May 4, 1912, the plaintiff moved for a new trial on a settled case, which motion was denied. The plaintiff appealed from a judgment and order; its assignments of error being to the effect that the court should have directed a verdict for the plaintiff, and that error was committed in the admission and rejection of evidence, the first of which raises the ultimate question as to whether there was sufficient evidence to warrant the jury in returning a verdict for the defendant.

1. It will be noticed that the contract of date August 21, 1908, was made prior to the plaintiff's incorporation. No assignment of this contract appears to have been made to the plaintiff. The plaintiff claims, however, that in fact it performed this contract, and that the defendant had notice and knowledge thereof at the time of such performance; and as a preliminary to this claim it asserts, and introduced evidence tending to show, that shortly after the arrangement concerning the trust agreement Mark quit the business, turning the same over to McGuigan, who conducted it under the old name and at the same place as theretofore, until the organization of the corporation, and that, while Mark continued to work at the same place, he was merely an employee of McGuigan until the incorporation. Neither of them, however, gave any notice of the change. It appears that the plaintiff did perform the contract of date September 23, 1908, and furnished the extras, and the plaintiff insists that the

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defendant was advised of McGuigan's acquisition of the business before the making of the first contract. On the defendant's part it is claimed, and evidence was introduced tending to show, that there were dealings between the defendant's firm and Fitzpatrick & Son, and also with Mark while he, as conceded, was conducting the business after his father's death under the name of Fitzpatrick Building Company; that at the time the defendant was considering the taking over of the building from the trustee he took the matter up with Mark, prior to the making of the contract of August 21, 1908, and they agreed that whatever work he did on the building should apply on his obligation to the defendant's firm; that the plaintiff's claim that the business of the Fitzpatrick Building Company was transferred from Mark to McGuigan was a subterfuge; and that in any event he had no notice or knowledge thereof, or of the subsequent incorporation of the plaintiff.

It is certain from what has been said that the first contract, which forms in part the basis upon which this action is founded, was at the time of its execution either the property of Mark Fitzpatrick, as the successor of Fitzpatrick & Son, and doing business as Fitzpatrick Building Company, or of McGuigan, doing business under the same name. In order, therefore, for the plaintiff to recover anything on this contract, no assignment to the plaintiff having been shown, it was necessary for it to prove its performance thereof, and also that the defendant had notice or knowledge of the plaintiff's acts in such regard either before or during such performance; and the court so charged without objection. That there was evidence reasonably sufficient to support the verdict of the jury in this regard in the defendant's favor is too clear for discussion. The defendant positively denied both notice and knowledge, and the testimony introduced on the plaintiff's behalf to establish either was, we think, very unsatisfactory. This conclusion disposes of the $750 claim adversely to the plaintiff.

Passing, now, to the consideration of the plaintiff's other claims, it should be remembered that the second contract was executed subsequently to the plaintiff's incorporation, and while it does not appear in the record when the materials and services under the im-

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plied contract for extras were furnished, we will assume that such were supplied after plaintiff's incorporation. The defendant's whole defense to these claims rests primarily upon the proposition that it was agreed between him and Mark, while the latter in fact constituted the Fitzpatrick Building Company, whatever labor and materials should be furnished by him would be applied upon his obligation to the defendant's firm. Of course, Mark had the right to do business under any name he saw fit to adopt, and if he made such contract it was a valid one; the plaintiff's suggestions that this contract, if made, would be unenforceable under the statute of frauds, being untenable, because such agreement would constitute a contract in liquidation of Mark's own debt, and not that of another.

We think it is clear that both the question as to the making of this agreement and of Mark's relation to the business at the time it is claimed it was made were for the jury. The plaintiff, however, strenuously contends otherwise; so we will say that we have examined the evidence with care in this regard. The alleged transaction of the surrendering of the business by Mark to his relative, McGuigan, under which their relation as employer and employee was reversed; the continuation of the business at the old stand and under the old name; the incorporation by the same parties, with the addition only of an employee; the testimony of the defendant concerning the declarations made by Mark and McGuigan, contrary to their claims on the trial—all of these circumstances taken together made, we think, a strong showing for the defendant to the effect that it is probable the contract was made, and renders an interference with the finding of the jury in such regard improper.

This conclusion does not, however, dispose of the question of the defendant's liability in the premises; for we consider that the labor and materials, both under the contract of date September 23, 1908 (which we have also referred to as the second contract), and the implied contract, were furnished after the plaintiff's incorporation, and by the corporation. The question now being, Is the defendant liable because of such fact? We eliminate the further question of whether the second contract was in fact made with the corporation, for we deem this to be a pure question of fact.

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Ordinarily, where a person performs labor for another with the knowledge of the latter and without his objection, the law implies a promise to pay therefor; but this rule is not of universal application, and where it appears that one, without negligence on his part, has been induced by another's conduct to enter into apparent contractual relations with or to receive the benefit of the services of such other person, when he has the right to believe that he is dealing with a third person, and it further appears that to hold him liable to any one except the person with whom he believed he was dealing will result in loss to him, he will not be held so liable. To hold otherwise would be to establish a contract which at least one of the parties never intended to make, and likewise to force a contract upon a party which he did not voluntarily enter into, to his damage and against his protest, and this without the existence of all the elements of a purely implied contract. The principles underlying this proposition are elementary. See Boston v. Potter, 123 Mass. 28, 25 Am. Rep. 9, and the many cases following the rule there announced. See, also, the cases upon the necessity of giving notice of changes in copartnerships, and those applying the rule that, where one of two innocent parties must suffer by reason of the act of a third party, he must bear the loss whose conduct, though innocent, has created the condition out of which the injury arises.

It would be a fraud upon the defendant's rights, if his contentions of fact be well founded, which was for the jury to determine, to hold him liable to this plaintiff; and we have reached this conclusion without reference to the question as to whether notice to Mark would constitute notice to the plainiff of the prior agreement between him and the defendant as to the application of payments to be made under the contracts on Mark's debt to the defendant's firm.

2. The assignments of error to the rulings of the trial court upon the admissibility of evidence have been examined, and we find no reversible error therein, nor any questions raised thereby requiring discussion.

Judgment and order affirmed.

Heard before HALLAM, J., took his seat.

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DANIEL HORGAN v. DULUTH LOG COMPANY.[1]

January 10, 1913.

Nos. 17,787—(108).

Log lien — finding sustained by evidence.

Finding, in an action to enforce a log lien, that the work was done between October 1 and March 31 of the following year, thus allowing, under R. L. 1905, § 3526, until the last day of April next thereafter for the filing of the lien statement, *held* sustained by the evidence.

Action by assignee.

An assignee of a log lien, claimed under R. L. 1905, § 3524, and which had been properly perfected by filing of the lien statement required by section 3525 before the execution of the assignment, *held* entitled to maintain an action to enforce the same, notwithstanding that the assignment was not filed for record as provided by section 3525; there being, under the evidence, no question of the rights of bona fide purchasers.

Action in the district court for St. Louis county to recover the sum of $296, for manual labor and services in cutting, hauling, banking and skidding certain logs, to enforce a lien thereon for that sum, with an attorney's fee and interest added, and to foreclose the lien. The Duluth Log Company, in its separate answer, denied the allegations of the complaint. The case was tried before Dibell, J., who made findings and ordered judgment in favor of plaintiff for the sum of $118.16. The motion of the log company for a new trial was denied. From the judgment entered pursuant to the order for judgment, the Duluth Log Company appealed. Affirmed.

Baldwin & Baldwin, for appellant.

William P. Harrison, for respondent.

Philip E. Brown. J.

Action to recover the agreed value of services rendered by James McConnell, the plaintiff's assignor, to one Smith, and, further, to have such amount adjudged a statutory lien upon certain logs, as

[1] Reported in 139 N. W. 491.

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against the Duluth Log Company. The case was tried to the court without a jury, and findings were made in favor of the plaintiff. From a judgment rendered in his favor, the log company appealed.

1. The appellant contends that the work for which the lien is claimed was done between June 24, 1910, and March 27, 1911, and that the court erred in finding that it was performed between October 1, 1910, and March 31, 1911. We have examined the record, and conclude that there was evidence tending to show that all labor performed by McConnell prior to October 1, 1910, had been settled for, and that the record contains evidence reasonably tending to support the finding.

The materiality of the question as to when the work was performed lies in the provision of R. L. 1905, § 3526, which provides that "the lien shall cease unless said statement [provided for by section 3525] be so filed within thirty days after the termination of such labor or service, unless the same shall have been wholly performed between October 1 and April 1 next thereafter, in which case the statement may be filed on or before the last day of said April." The defendant, insisting that the court erred in its finding as above stated, claimed that as the statement was not filed until April 27, 1911, it was not in time; that is, that from March 27, the day on which the defendant claims the last work to have been performed, to April 27 next thereafter, was more than 30 days "after the termination of such labor or service." But, in view of our determination that the evidence is sufficient to sustain the finding of the court, the defendant's contention that the statement was not filed in time cannot, of course, be sustained, and the question as to computation of time raised thereby is immaterial, and it is neither necessary nor proper that we should pass upon it at this time.

2. R. L. 1905, c. 69, contains our various lien laws; section 3525 thereof providing, in cases where a lien is sought on timber, for the filing of a statement for record, with the surveyor general of the timber district in which the labor is performed, specifying the details of the claim, etc. The act further requires, in effect, that a person having a claim on timber entitling him to a lien "may assign the same in writing to any person, either before or after the making

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and filing of the statement," and authorizes the assignee to make and file the lien statement, if unfiled at the time of the assignment, and that, when such a statement and assignment have been made and filed, the assignee is subrogated to all the rights of the original claimant, and authorized to enforce the lien in his own name, in the same manner and with the same effect as the original claimant could have done, had he not assigned the same.

The appellant predicates his last claim for reversal upon the portion of this statute which provides for the filing of the assignment, when taken in connection with the undisputed fact that McConnell, who performed the labor for which the lien is claimed, duly filed for record a proper lien statement on April 27, 1911, and also the sixth finding of the court, which is as follows: "That thereafter, and prior to the commencement of this action, said McConnell sold said indebtedness and claim of lien, for a valuable consideration, to the plaintiff, and executed and delivered to him a written assignment thereof, and that said assignment has never been filed or recorded with the surveyor general of the Fifth lumber district of Minnesota."

The argument is that the legislative intention was to require the assignee to file his assignment as a condition precedent to the perfection of his rights under the lien, in order to give innocent and third parties, such as the appellant in this case, notice of all the essential particulars regarding the lien; and it is argued that the plaintiff, having failed to comply with this requirement, has no lien. It is urged that it is important for third parties to know which person is entitled to the lien, and, further, that while the assignment remains unfiled the natural inference is that the lien remains the property of the assignor, which inference, if acted upon, would probably result in damage to those deceived thereby.

We cannot sustain the appellant's contention. Our lien laws have been declared to be remedial statutes, subject to liberal construction. Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. 545. The question before us should be kept in mind. It is: Can an assignee of a log lien claimant, who has received an assignment in writing of the claimant's rights, after the filing of the lien

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statement, be precluded from recovery thereon merely because of his failure to file the assignment for record? No question of bona fide purchaser is involved. There is neither any finding nor evidence upon which such a claim can be based. We know of no reason why the statute should be given the construction contended for; nor can we see how the appellant could be prejudiced by the failure to record the assignment. McConnell perfected his lien before the assignment, and the plaintiff should be held to have succeeded to his rights. Furthermore, section 3548 of the same chapter of the revision expressly gives an assignee of any lien given by such chapter the right to enforce it.

Judgment affirmed.

Heard before HALLAM, J., took his seat.

STATE ex rel. MORRISON COUNTY AGRICULTURAL ASSOCIATION v. S. G. IVERSON.[1]

January 10, 1913.

Nos. 18,012—(266).

Mandamus — public officer.

Where the state auditor awarded to an association which was not entitled thereto the aid and recognition provided for by Laws 1911, cc. 280, 381, relating to the encouragement of county and district agricultural societies, mandamus was the proper remedy to compel him to make the award to the society legally so entitled.

Decision sustained.

Finding of the trial court in favor of the relator in such proceeding sustained.

Upon the relation of the Morrison County Agricultural Association, the district court for Ramsey county issued its alternative writ

[1] Reported in 139 N. W. 498.

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of mandamus directed to Samuel G. Iverson, auditor of the state of Minnesota, directing him to execute and deliver to relator his warrant or voucher for $428 or show cause why he had not done so. The respondent made answer, alleging, among other matters, that the Morrison County Agricultural Co-operative Society was duly incorporated and in all respects complied with the laws applicable to such society; that it succeeded the Little Falls Street Fair Association, which had been in existence since 1906, and received state aid as the only organization of the kind in Morrison county on fairs held in the years 1906, 1908, 1909, and 1910. The answer also set out the facts in respect to the hearing before and decision by respondent concerning the claims of the two societies. The matter was heard before Olin B. Lewis, J., who made findings and ordered that a peremptory writ issue. From the judgment entered pursuant to the order, respondent appealed. Affirmed.

Lyndon A. Smith, Attorney General, *Alexander L. Janes,* Assistant Attorney General, and *N. N. Bergheim,* for appellant.

Richard N. Gardner, and *Lancaster, Simpson & Purdy,* for respondent.

Philip E. Brown, J.

It has been the settled policy of the state, as indicated by its legislation for many years, in order to stimulate interest in agriculture and in the state agricultural society, to donate money for the purpose of encouraging the holding of a fair in its several counties. This appears from the statutes which have been called to our attention by counsel in support of their contentions.

The first act so referred to is Laws 1897, p. 97, c. 86, which passed into R. L. 1905, with slight changes, as section 3098, which section appropriates $14,000 to county agricultural societies and others, to be divided pro rata among such of those societies as have a membership of 25 or more, are active, and hold annual fairs, paying out in premiums as much as they receive from the state. This section further provides that the pro rata shall be paid to the oldest active society in the county, except where there are two of the same age, in which case it shall be divided equally between them. It further

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provides that if fairs have been advertised, but the holding thereof has been prevented, and expenses have been incurred for advertising preparation, the state shall pay a stated sum to the association. It is made the duty of the state agricultural society to certify to the state auditor a list of all societies that have complied with the provisions of this section.

R. L. 1905, § 3080, provides, among other things, for the selection of three delegates by each county and district agricultural society, and that if no county society exists, or if an existing one fails to hold an annual fair, and any city therein shall maintain an annual street fair devoted to agricultural interests, then three delegates shall be selected from such street fair association, the senior association, however, to be entitled to such membership, provided that to entitle such society to membership it must maintain an active existence, have a yearly membership of 25, hold annual fairs, and shall have paid out each year at least $300 in premiums.

By Laws 1905, p. 490, c. 307 [R. L. Supp. 1909, § 3080—1], it was provided that if no county agricultural society exists in any county, or if such society fails to hold an annual fair, and any city therein shall maintain annually a street fair devoted to agricultural interests, such street fair association shall choose delegates to the state agricultural society; provided, however, that the senior association shall be entitled to such membership, all conditioned the same as provided by R. L. 1905, § 3080, with reference to the maintenance of an active existence, etc.

R. L. 1905, § 3097, provides that an agricultural society may be formed by citizens of any county, or of two or more counties jointly, but only one such society shall be organized in any one county. This section was in turn amended by Laws 1909 p. 506, c. 416 [R. L. Supp. 1909, § 3097], to the effect that if any county agricultural society has been incorporated for six years, and during that time has failed to hold or assist in holding any county agricultural fair, then another county agricultural society may be incorporated and shall be entitled to receive the state aid, as conditioned by R. L. 1905, § 3098.

By Laws 1911, p. 389, c. 280, all standing appropriations in aid of county and district agricultural societies were repealed as to any

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fairs held after 1910, and $75,000 was appropriated to aid county and district agricultural societies pursuant to the provisions of R. L. 1905, § 3098, or any amendments thereof, to be paid out for premiums, but only to county and district agricultural fairs held during the year 1911 and annually thereafter. Laws 1911, p. 530, c. 381, amends section 3080 by omitting therefrom all provision concerning street fairs. Section 5 of the same act provides for the incorporation of agricultural societies by citizens of any county or counties jointly, but only one such society shall be organized in any county.

The controversy in this case turns upon the question of which one of two agricultural societies organized in the same county is entitled to the state aid and to membership in the state society.

The case comes here on an appeal from a judgment entered in a mandamus proceeding awarding relief to the relator, the Morrison County Agricultural Association, which we will hereafter refer to as the Motley Association, as against the protest of the appellant, the Morrison County Agricultural Co-operative Association, which we will call the Little Falls Society. The proceeding was tried by the court without a jury, findings were made, and the same are unchallenged, so far as the facts are concerned, and are to the following effect, among other things:

That the Motley Association was incorporated as an agricultural society on February 3, 1911, and has since maintained an active existence, with a membership of more than 25 residents and citizens of the county; that it held its first annual fair in Motley in September, 1911, paying out in premiums $428 to exhibitors; that when it was organized there was not in the county, or in any district of which the county was a part, any agricultural society, nor had there been one therein within six years prior to such incorporation. It is upon these facts, so found, that the claim of the Motley Association is based.

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As to the claim of the Little Falls Society, the court found the facts as follows:

That it had existed as an unincorporated association for several years prior to the date of this proceeding, and had held fairs at Little Falls, in Morrison county, during that time, including the years 1906, 1908, 1909 and 1910; that it had duly paid premiums and made report and received state aid for such years, no other society receiving any part of such aid during such period; that it then had a membership of over 25 citizens and residents of the county, and held annual street fairs as stated; that in July, 1911, this society, at a special meeting, duly resolved to incorporate under the name of Morrison County Agricultural Co-operative Society, that the business carried on by the Little Falls Street Fair Association should be continued by the proposed society, and that all moneys and property of such association should be delivered to the officers of the latter, upon the filing of its articles of incorporation, and further resolved that the society would proceed immediately to perfect its incorporation, etc.; that thereafter the members of the association executed articles of incorporation, and pursuant thereto the society so organized adopted, held, and acted upon all the property and rights of the association transferred by the resolution, and became an organized body under the name stated; that this society held a fair in the county in September, 1911, and paid in premiums to exhibitors the sum of $623, making due report thereof.

The court further found that the Motley Association and the Little Falls Society applied to the state auditor for recognition as the senior society entitled to share in the state aid; that both appeared, and that after a hearing the auditor rendered his decision in favor of the Little Falls Society.

As conclusions of law, the court resolved the controversy in favor of the Motley Association, and this appeal followed.

1. The Little Falls Society contended below, and urges in this

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court, that mandamus was not the proper remedy, and that the court erred in denying its motion to quash the writ. This contention is predicated upon the proposition that the statutes contemplate that the decision of the state auditor shall be final, and not made subject to review by mandamus, unless it appears, as it does not here, that there was an abuse of discretion, and, further, that this remedy, while available to compel an officer to act, will not be awarded to compel him to change his decision after action. We cannot sustain this contention. It was the duty of the auditor to award relief to only one of the parties. The statutes provide which party is so entitled, and the auditor has no discretion to refuse relief to the association or society entitled thereto by law; and if it appear that he has made a wrong determination in this matter, mandamus is the proper, and probably the only, remedy. See 2 Dunnell, Minn. Dig. § 5762.

2. Coming, now, to the merits of the appeal, the question to be determined is: Which of these two organizations was entitled to state recognition and aid? The court below was of the opinion that the Little Falls Society was not the senior organization, for three reasons, the first and third of which were: (1) Because the fair held by it in 1910 was not in compliance with the law; and (3) because the society failed to file its articles of incorporation and proof of the publication of its certificate of incorporation with the secretary of state, and furthermore did not comply with the statute relating to the incorporation of county agricultural societies. The Little Falls Society contends that neither of these grounds is tenable. We will not stop, however, to discuss this contention; for we think the case may well be disposed of on the second ground assigned by the lower court, and for the purposes of this case it may be assumed, without any expression of opinion to such effect, that the facts do not warrant the deductions stated. Neither will we give any weight to the fact that the Little Falls Society was incorporated as a co-operative association, and not under the provisions under which its rival was incorporated.

The second ground assigned by the lower court for its decision was that the law giving street fair associations recognition and rep-

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resentation under the acts relating to agricultural societies and state aid was omitted from and repealed by Laws 1911, p. 530, c. 381, some months prior to the time when the Little Falls Society was incorporated. The last-named society insists that the court below erred in this conclusion, because, as claimed by it under the existing statutes, properly construed, the legal status of the rival claimants should not be determined from the mere time of their incorporation, and that the fact of incorporation should not be considered to be the test as to the right of priority; the true criterion being the seniority and activity in fact, as evidenced by the holding of fairs. These deductions are made largely from a consideration of the several acts referred to, both prior to and also in connection with the act of 1911. But in considering these statutes we must be mindful of the rule stated in Hamilton v. Rathbone, 175 U. S. 414, 421, [20 Sup. Ct. 155, 158, 44 L. ed. 219], where it is observed:

"Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve,* but not to *create* an ambiguity."

The further point is urged that it is unreasonable to believe that the legislature intended to give the Motley Association any preference merely because it became incorporated first, and that the Little Falls Society, having succeeded to the rights of the street fair association, and being in effect a continuation thereof, such association having held fairs for several years prior to 1911, is entitled, both upon legal and equitable construction of the statutes, to preference. There would be force in these contentions, were this a case where equitable principles could be applied; but the controversy here is over a mere bounty, to which neither claimant has any claim outside of the statutory provisions, and both parties, in the beginning, had the same opportunity to bring themselves within the provisions of the statutes by incorporating as an agricultural society, etc. Neither can

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we see how the street fair association had anything to transmit to its corporate successor. The solution of the whole case depends upon statutory construction, and we are unable to see how any other result can be reached than the one arrived at by the trial court, when we consider that Laws 1911, p. 530, c. 381, omits reference to street fair associations, and that chapter 280 of the same laws likewise omits to make any appropriation for any kind of fairs except district and county fairs. It seems clear that, if the street fair association had continued in existence, it would not have been entitled to state aid for holding a fair in 1911, and that its alleged successor, as such, cannot stand in any better position as against a county agricultural association, which is its senior in the matter of existence as a county agricultural society.

Judgment affirmed.

Heard before HALLAM, J., took his seat.

HENRY BRIDGEMAN and Another v. A. O. GIESE.[1]

January 10, 1913.

Nos. 17,847—(105).

Surrender by tenant — evidence — findings.

Evidence, in an action for rent of certain storerooms, wherein the defendant claimed to have surrendered the premises as untenantable prior to the termination of the term of the lease, considered, and *held* not so clearly against the findings as to warrant a reversal.

Counterclaim — finding sustained by evidence.

The court's finding, in such action, against the defendant's counterclaim for damage to his goods caused by water leakage from other parts of the building, *held* sustained by the evidence.

[1] Reported in 139 N. W. 489.

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Appeal by defendant from an order of the district court for St. Louis county, Ensign, Cant and Dibell, JJ., affirming an order of the municipal court of Duluth. The facts are stated in the opinion. Affirmed.

John A. Keyes, for appellant.

Baldwin & Baldwin, for respondents.

PHILIP E. BROWN, J.

Action brought in the municipal court of Duluth to recover rent of a part of a building leased and used by the defendant as a hardware store. The complaint alleged substantially that the plaintiffs leased to the defendant a storeroom for the period of 2 years and 8 months from September 1, 1907, to and including April 30, 1910, reserving as rent after May 1, 1908, $80 per month, payable in advance, and that defendant took possession under the lease, and so remained in possession until and including April 30, 1910, without paying any rent for the month last named, and demanded judgment for the sum stated.

The defendant answered at great length, admitting his tenancy and failure to pay one month's rent, and alleged that his store was situated on a part of the street floor of a three-story building owned by the plaintiffs, most of which was occupied by their tenants, a portion, however, being under the control of the plaintiffs; that in fact ever since he entered the store and building as lessee the premises demised to him had been untenantable because the water and steam pipes, plumbing and sewer connections, and water and steam fixtures were improperly constructed and out of repair, thus causing water to leak into the stores of the building, and through the ceiling of the part leased to the defendant, and upon his goods, greatly damaging them. In addition to this, the defendant alleged that the plaintiffs permitted others to use the basement of the building, after the execution of the defendant's lease, for the manufacture of dairy products, thus causing disagreeable odors and steam to permeate the defendant's store, rendering it unfit either for habitation or for business, and that the noise and jar of the machinery thus operated below the stores caused a like effect. The defendant further alleged

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that he removed his goods from the plaintiff's building in March, 1909, [sic] a month before his term expired, after giving the plaintiffs notice of the termination of the tenancy, pursuant to the provisions of the lease, because of the matters stated, by which the premises were rendered untenantable. The defendant also set out the facts concerning the alleged defective condition of the fixtures and the improper use of the basement, including the following matters by way of counterclaim:

That the building was heated by steam generated in the basement and distributed by iron pipes, and water was supplied by iron pipes, both steam and water being so furnished pursuant to the provisions of the leases with the several tenants of the building; that the plaintiffs, however, retained the exclusive control over the heating plant and the system of water distribution, and undertook to and did make all repairs thereof; that the plumbing in the building was defective and out of repair, thus causing water to enter the defendant's storeroom and damage his goods, of which facts the plaintiffs were notified, but that while repairs were made, temporarily stopping the flow of water, the plaintiffs negligently failed to stop the leaks and to abate the nuisance, though having knowledge thereof.

The counterclaim also contained allegations that the building was improperly constructed, its walls and foundations being insufficient for the uses permitted therein; that the operation of the machinery in the basement, as above stated, also caused goods to fall from the shelves of the store, and the building to settle and leave cracks in the walls near the storeroom floor, which were negligently allowed to remain; all of which resulted to the defendant's damage in the sum of $500, for which sum he demanded judgment. The plaintiffs replied, admitting the leasing of the basement for the manufacture of dairy products and the use of machinery therein; also that the defendant had the right to terminate his lease on May 1, 1908, by no tice, but at no other time, and alleged that no notice was given; also admitted that the premises rented to defendant and certain tenements adjoining the same, owned by the plaintiffs, were heated by steam in the usual manner, but denied all other allegations of the answer.

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The cause was tried to the court without a jury. Findings were made, among others, to the effect that the defendant remained in possession and control of the leased premises until and including April 30, 1910; the due performance by the plaintiffs of all of the conditions and things to be by them kept and done according to the terms of the lease, the removal of the defendant from the premises being without the plaintiffs' fault or neglect; and also that during the term the premises were always in good tenantable condition, neither the plaintiffs nor any one under their control suffering or permitting any damage to the defendant's goods; and upon such findings the court ordered judgment for the plaintiffs for the sum of $80. Thereafter the defendant moved for amended findings, to the effect that the defendant's removal was caused by the plaintiffs' negligently rendering the premises unfit and unsafe for occupancy for the purposes for which they were rented, and also that the plaintiffs negligently allowed the plumbing and water piping of the building, outside of the part demised to the defendant and under their own exclusive control, to become defective and out of repair during the term, because of which water escaped into the defendant's store and damaged his merchandise in the sum of $500, and that the court change its conclusions of law accordingly. The defendant also moved that, in the event of the denial of such motion, he be granted a new trial on the grounds: (1) That the decision was not sustained by the evidence and was contrary to law; (2) of errors occurring at the trial and excepted to by the defendant, specifying various alleged errors to which exception was taken. These motions being denied, the defendant appealed to the district court, where the same result was reached as in the municipal court, and thereupon the defendant appealed to this court.

The lease of the premises provided that the defendant should hold them "just as they are," and "without any liability or obligation on the part of said lessor of making any alterations, improvements, or repairs of any kind, in, on or about said premises," during the term, and also that, in case the premises became untenantable and unfit for occupancy from any cause, then the liability of the lessee for rent and all his rights of possession would cease at once. The lessors cove-

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nanted to supply water and heat, and the lessee reserved the privilege of canceling the lease on May 1, 1908, upon written notice of his intention so to do, given on or before April 1 of such year.

1. We will first consider the defendant's claim that the plaintiffs were not entitled to recover the rent for April, 1910, this claim being to the effect that he surrendered the premises in the March previous, because they became untenantable. No question is made in this case but that this tenant had the legal right to relieve himself of liability for rent by surrendering possession when the premises became untenantable, and we will assume that they did become so, as claimed; but in order to avail himself of such right he was required in fact to surrender possession of and control over them during the term. The real question, then, on this phase of the case is: Did the defendant in fact surrender the premises prior to April 1, 1910? In this connection the defendant concedes that the rule of procedure is, as stated in Northland Produce Co. v. Stephens, 116 Minn. 23, 28, 133 N. W. 93, and Oertel v. Pierce, 116 Minn. 266, 133 N. W. 797, that our duty is only to inquire whether the evidence supports the finding of the trial court, and that in order to justify a reversal the evidence must be clearly against the findings, but contends that there was in this case no evidence at all to sustain the one in question. We will, however, consider the defendant's contention under the rule above stated, notwithstanding that he submitted his case upon the theory of a total lack of evidence.

Evidence was received tending to show that the demised premises became untenantable prior to and during March, 1910, because of water leaking through the ceiling of the storerooms occupied by the defendant, from the upper part of the building, without fault on his part, thus injuring his merchandise and causing him to remove from and surrender the premises during that month. There was also evidence of other causes not attributable to the defendant from which the same conclusion might have been reached. On the other hand, we find testimony in the record, given by an apparently disinterested witness, to the effect that, while the defendant removed his stock from the storerooms in March, 1910, he refused to give up possession or to surrender the keys thereof until the expiration of the lease. We

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cannot, therefore, disturb the court's third finding, to the effect that the defendant remained in possession and control of the store until the termination of the term.

2. We pass, now, to the consideration of the counterclaim. The defendant predicates his right to recover thereon upon the proposition that where a landlord retains, as was the case here, a portion of the building under his control, he must keep such part in repair, and that if he fail to do so he will be liable to the tenant in tort for any resulting damages arising by reason of such negligence, and this irrespective of and entirely apart from the conditions of the lease, and, furthermore, that the plaintiffs, having undertaken to make certain repairs of the plumbing where there was leakage, as appeared from the evidence, their failure to properly repair established their negligence in the premises. Upon this theory the defendant introduced evidence tending to prove the allegations of the counterclaim, and also that he suffered damage in a sum exceeding $500, from water leakage as above stated, without fault on his part; but no testimony was offered that he suffered any pecuniary loss, except from water. He makes the same claim with regard to the insufficiency of the evidence as stated in subdivision 1 of this opinion.

The plaintiffs do not contend that the rule as to a landlord's liability, above stated, is not the correct one, but insist that there is evidence in the record establishing, or at least tending to show, that the plaintiffs were not negligent. The rule stated is predicated wholly upon the doctrine of negligence, and it does not follow, merely from the fact that water leaked through the ceiling of the storeroom, situated as it was in a large building occupied by other tenants, that the plaintiffs were negligent, for such water might have come from sources for which the plaintiffs were not responsible. The defendant's theory is that the water which did the damage came from certain valves in the water pipes in a closet over his store, which was under the control of the plaintiffs. The plaintiffs offered evidence tending to show that shortly after the leakage commenced their attention was called to the matter, and that the valves above mentioned were properly repaired; that the building was a new one, with a suitable plumbing system installed therein; that no such

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amount of leakage occurred as the defendant claimed; and, as rendering the defendant's claims improbable, that he failed to exercise his option to cancel the lease under the provision above recited, and, furthermore, that in March, 1909, when the defendant claims that the leakage was going on, he refused to dispose of his interest in his lease.

We have read the record with care, and deem it neither necessary nor profitable to discuss the evidence further, for we are satisfied that it was sufficient to sustain the court's finding. We will, however, advert to the fact, shown by the evidence, that some of the water which damaged the defendant's goods came from a clogged water-closet situated in a room occupied by one of the plaintiffs' other tenants, and for whose negligence, if any, the plaintiffs could not be held responsible under any testimony in the record, except on the theory that they were insurers against such damage, which theory is untenable; and there can be little doubt that the court below was right, on this ground alone, in denying a recovery on the counterclaim, for there was no evidence to indicate what portion of the defendant's damage came from this cause.

3. We have also considered the assignments of error concerning the admission of evidence over the defendant's objections, and likewise the court's failure to amend its findings and to make certain others. The appeal to the district court in this case was tried before Judges Ensign, Cant, and Dibell, who said: "The evidence amply justifies the finding of the trial court. There were some errors in the course of the trial, but not of so substantial a character as to call for a new trial. The case was fairly presented on both sides, and it seems that the right conclusion was reached." These words express our conclusion on the questions immediately before us, as well as all others involved herein.

Order affirmed.

Heard before HALLAM, J., took his seat.

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OLINE HOLIEN and Others v. ARCHIE M. SLEE.[1]

January 10, 1913.

Nos. 17,964—(134).

Deed as mortgage — evidence.

In an action by the widow and heirs of a grantor against the grantee to have certain deeds declared to be mortgages, an instrument executed by the defendant after the death of the grantor, whereby he agreed to sell a portion of the property involved to one of the heirs, and to accept, as a credit upon the stipulated consideration, the widow's quitclaim deed to another portion of such property, was admissible as evidence tending to show conduct on the part of the defendant inconsistent with his claim of absolute ownership.

Same — circumstantial evidence.

The fact that a deed absolute in form is really a mortgage may be established by circumstantial evidence, especially where the grantor is dead.

Findings sustained by evidence.

Evidence in an action by the heirs of a grantor to have certain deeds declared to be mortgages, and for other relief, considered, and *held* sufficient to sustain the findings of the trial court in favor of the plaintiffs.

Action in the district court for Goodhue county for an account of the amount due defendant upon certain loans made by him to plaintiff's husband, and to compel defendant to reconvey the interest of plaintiff in the lands conveyed to defendant to secure payment of the loans, or for a partition, or if that could not be made for a sale of plaintiff's share and the balance due her after payment of the expenses. Plaintiff's children were made parties plaintiff by order of court. Defendant Slee's answer expressly denied that the deeds mentioned in the complaint as executed by plaintiff and her husband

[1] Reported in 139 N. W. 493.

Note.—The authorities on the question as to whether a deed absolute on its face, but intended as a mortgage, conveys a legal title are reviewed in a note in 11 L.R.A.(N.S.) 209.

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were executed or given as security for debt. The case was tried before Johnson, J., who made findings, as stated on page 263, infra, and ordered judgment in favor of plaintiff Oline Holien in the sum of $622.89, and in favor of each of the other plaintiffs in the sum of $311.46. From an order denying a new trial, defendant Slee appealed. Affirmed.

William W. Pye, for appellant.

A. J. Rockne, for respondents.

Philip E. Brown, J.

Action seeking to have certain deeds executed by the plaintiff, Oline Holien, and her deceased husband, Andrew A. Holien, adjudged to be mortgages, and for other relief permissible only on the theory that such deeds were mortgages. There is practically no dispute concerning the main facts, which, stated chronologically, are as follows:

On December 7, 1891, Andrew O. Holien, the husband of the plaintiff Oline, was the owner in fee and in possession of lots 9 and 10, of block 4, in Dennison, and on that date, being indebted to the defendant in the sum of $330, they executed a mortgage on such lots to him for the amount of his debt. Default having subsequently occurred, the defendant foreclosed the mortgage, and on May 4, 1901, the lots were sold at mortgage sale to the defendant for $510.40, being the amount due on the mortgage, together with the expenses of foreclosure. On October 14, 1901, Andrew O. Holien was the owner of an undivided one-third interest in 172 acres of farm lands in Goodhue county, the same being in two tracts, one in sections 33 and 34, in Warsaw township, and containing 160 acres, and the other being in section 26, Holden township, and Holien's interest being subject to a life estate in the lands held by his mother. On the day last mentioned he was indebted to the defendant in the sum of $500, and by deed of quitclaim conveyed to the defendant his interest in such farm lands, in consideration, as the defendant claims, of the debt; the lands, however, being worth at that time $60 an acre, inclusive of the life tenant's interest, her age then being 73 or 74

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years. This deed was recorded shortly after its execution. Holien thereafter became further indebted to the defendant in the sum of $350, and by deed of quitclaim, dated October 17, 1901, conveyed to him the above-mentioned lots 9 and 10, which were then of the value of $900. This deed was recorded on December 5, 1901. On February 28, 1902, Holien executed to the defendant a quitclaim deed for the stated consideration of one dollar, conveying to him the premises in sections 33 and 34; this deed being made to correct the description in the deed of date October 14, 1901. Oline Holien, the said Andrew's wife, joined in all the above-mentioned conveyances executed by him. On February 28, 1902, Holien and the defendant executed an agreement in writing, wherein the defendant agreed to convey to Holien lots 9 and 10 and the lands in sections 33 and 34, upon the payment of $1,230, payable $30 at the time of the execution of the contract—which was then paid—and $1,200 on October 18, 1906, with interest at the rate of 8 per cent., payable annually, no part of which, either principal or interest, has been paid. On February 27, 1906, the defendant served upon Holien written notice of the cancelation of the contract to convey, if the agreed payments were not made within 30 days from the date of the notice. Holien failed to pay any sum after the service of such notice. On or about April 1, 1906, the defendant took possession of the lots, and has since received the rents and profits thereof. The life tenant of the farm lands died in December, 1909, and the defendant then took possession thereof, and since that date, and until April 1, 1911, received the rents and profits therefrom, also, and on the last-mentioned date he conveyed the lands in sections 33 and 34 to innocent purchasers for the sum of $3,161.73. Holien died February 21, 1907, intestate, and the plaintiffs are his widow, children, and only heirs.

The action was tried to the court without a jury. The court made findings, among other things, in accordance with the facts stated, and in addition thereto, that the several deeds mentioned were mortgages in fact, that the contract of date February 28, 1902, constituted a defeasance, the consideration recited therein being the amount then due the defendant from Holien; and as conclusions of law found

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that the plaintiffs, being Holien's widow and children, were the owners of lots 9 and 10, and should recover from the defendant the value of their several interests in sections 33 and 34, after deducting the amount due on the mortgage. Thereafter the defendant moved for a new trial, and from an order denying the motion appealed to this court.

1. The assignments of error, save one, are all based upon the proposition that the court erred in finding that the deeds were in fact mortgages. The other assignment, which, for convenience, we will consider first, relates to the admission in evidence of an instrument designated as "Exhibit B," over the defendant's objection and exception. It appeared that on August 29, 1911, the defendant and Joseph A. Holien, one of the plaintiffs, entered into a written agreement of that date, in which the defendant contracted to convey to Joseph, by warranty deed, a portion of lot 10, upon the payment by Joseph of $1,370. This contract contained the following provision:

"Party of the first part [the defendant, Slee] hereby agrees to accept quitclaim deed from Oline Holien [Joseph's mother, and one of the plaintiffs] covering 177 acres in townships of Warsaw and Holden, in sections 33 and 34, Warsaw, and section 2, Holden [being the farm lands above mentioned], as five hundred dollars ($500) part payment of above purchase price."

"The defendant claims that the only purpose of introducing this contract in evidence was to show an offer of settlement, and thereby impliedly to show that the defendant admitted some claim of plaintiff;" and the defendant argues that, "if this clause meant what plaintiff attempts to imply, it was a mere offer, was without consideration, and was, of course, unaccepted and not evidence." We think that the defendant misconceives the purpose of the offer of this instrument, and, furthermore, that he is mistaken concerning the record; for we find no evidence indicating that, at the time of the execution of this instrument, any of the defendants knew of their alleged equities in the land, or that there was any dispute between the parties as to whether the deeds were really mortgages.

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The issues in this action are clear-cut; the ultimate question for determination thereunder being whether the several deeds in question were in fact mortgages. This Exhibit B was properly received in evidence, for it tended to show that the defendant was willing to concede to the son $500 on the purchase price of the lot, if he would induce his mother to deed the farm lands to the defendant. This conduct was inconsistent with the defendant's claim of title in fee, and was, at least, an unusual, if not extraordinary, act on the part of one claiming absolute title. And while not strictly germane to the exact point now under consideration, we will say, further, that such conduct suggests a motive, and what could such motive be, if the defendant's contentions in this case are well founded? The defendant's explanations of his willingness so to contract, viz., because Mrs. Holien had signed all of the deeds by mark and in his absence, and he had heard that she claimed she did not know they included Holien's interest in the farm property, and other matters not necessary to mention, are not persuasive, and certainly the trial court was not bound to accept them as true.

2. We come, now, to the consideration of the question of the sufficiency of the evidence to sustain the findings, and, for the purposes of this case, we will consider that the rule applicable is, as claimed by the defendant, that a mere preponderance of the evidence is insufficient to establish that a deed absolute in form is in fact a mortgage, and that to establish such fact the proof must be clear, strong, and convincing. See 2 Dunnell, Minn. Dig. § 6157. This rule, however, must be taken together with another rule, announced by Mr. Justice Brown in Oertel v. Pierce, 116 Minn. 266, 133 N. W. 797, as follows: "The rule guiding this court in the consideration of the question of whether the findings of the trial court are sustained by the evidence remains the same, whether the fact found be required to be established by a preponderance of the evidence, or by clear, convincing, or satisfactory evidence. The evidence must be clearly against the findings in either case to justify reversal."

There is no direct evidence in the record that Andrew O. Holien ever claimed that the deeds in question were mortgages, or that any of the plaintiffs even objected to the sale of the property by the de-

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fendant. The defendant testified in his own behalf, giving his version of the transactions resulting in the several conveyances, and the scrivener who prepared the contract of date February 28, 1902, testified, in effect, that the parties thereto stated that Holien proposed to purchase the properties described in the contract, and that the contract was executed to bind the bargain; "that is to say, if he [Holien] fulfilled his contract, why, he was to have a deed." So far as the defendant's evidence is concerned, it was not of such nature as to require the court to accept it as true. In addition to the facts above recited, it appeared that on August 13, 1898, Johnson & Co. obtained a judgment against Andrew O. Holien for $41.65, which thereafter was purchased by the defendant, who, in October, 1908, caused an execution to be issued thereon and a levy to be made upon the farm lands above mentioned, and also upon a certain other 5-acre tract, and that at the sale under such execution the defendant became the purchaser and received a sheriff's certificate.

While it is true, as claimed by the defendant, that there was no direct evidence tending to prove that the deeds here under consideration were mortgages, such is not unusual where one of the parties to a deed is deceased, as appears here; and nearly always in such cases the plaintiffs' claim must be established, if at all, by circumstantial evidence. Such evidence is admissible in this state to prove all issuable facts in civil cases. 1 Dunnell, Minn. Dig. § 3234. The first transaction between the parties, after the giving of the mortgage in 1891, was the defendant's alleged purchase of Holien's equity of redemption in the lots described, subsequently to the foreclosure of the mortgage. Concerning transactions of this kind, it is stated in Marshall v. Thompson, 39 Minn. 137, 140, 39 N. W. 309, 311:

"Though a mortgagee may purchase the equity of redemption, yet where the relation of mortgagor and mortgagee is once established, the courts scrutinize with great jealousy the acquisition of the equity of redemption by the mortgagee in any other way than by regular foreclosure, and additional conveyances exacted or secured by the mortgagee for his benefit cannot be used to prevent a redemption. They 'proceed from the same old root, and are subject

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to the same equity; otherwise hardship and oppression might be practiced upon the mortgagor.' The rule is inflexible, 'Once a mortgage, always a mortgage.'"

In Simpson v. First National Bank, 93 Fed. 309, 35 C. C. A. 306, 311, it was held that, where the relation of mortgagor and mortgagee is shown to have existed, a legal presumption arises that these relations continued, and that transfers or conveyances of property from the debtor to the creditor were made, not in payment of, but as further security for, the debt.

Inadequacy of consideration and conduct inconsistent with the theory of ownership are always material to establish a claim such as is here made by the plaintiffs. The authorities so holding, and likewise upon the other principles above announced, are too numerous and too well settled to require citation. Let us, then, apply these principles to the instant case. It appears conclusively that the consideration, claimed to have been paid by the defendant for the farm lands, was grossly inadequate, and it is significant in this regard that the defendant testified that he did not know what the lands were worth at the time of his alleged purchase. Furthermore the defendant's explanation of why he caused the lands to be sold under execution is unsatisfactory. The instrument of date February 28, 1902, is by no means conclusive as to the true relations existing between the parties. Equity's vision is not circumscribed by formal instruments, but extends through matters of form to the heart of the transaction. Weighing, therefore, all the circumstances disclosed, we think the evidence clearly justified the trial court's determination of the issues in favor of the plaintiffs.

Order affirmed.

Heard before HALLAM, J., took his seat.

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RANDALL PRINTING COMPANY and Others v. SANITAS MINERAL WATER COMPANY and Others.[1]

January 17, 1913.

Nos. 17,771, 17,803—(140, 141).

Assignment of error.

In this action by creditors of a corporation to recover of stockholders thereof unpaid stock subscriptions, it is *held* that the point that a judgment obtained by one of the plaintiffs against the corporation was rendered without jurisdiction of the defendant is not available to appellants here, there being no assignment of error challenging the finding that such judgment was duly recovered.

Insolvent foreign corporation — action against resident stockholders.

An action in the nature of a creditor's bill under R. L. 1905, § 3173, to reach unpaid stock subscriptions by resident stockholders of a foreign corporation, may be maintained in this state. Conceding that an action under R. L. 1905, § 2865, will not lie to recover unpaid subscriptions to the stock in a foreign corporation, the complaint in this case was sufficient as a complaint under section 3173, save for a defect of parties plaintiff or defendant, and such defect, not having been objected to by demurrer or answer, was waived.

Reason for recovery of unpaid stock subscriptions — local law governs.

The right of creditors to recover of stockholders in a corporation unpaid stock subscriptions does not depend upon constitutional or statutory provisions imposing a liability of stockholders to the corporation, but is based upon fraud. The remedy is governed by the law of the forum, and there is no distinction between domestic and foreign corporations in respect to such right of creditors to recover.

[1] Reported in 139 N. W. 606.

Note.—The general question of the conditions precedent to equitable remedies of creditors, is discussed in an extensive note in 23 L.R.A.(N.S.) 1.

As to the effect of the issuance of stock at discount on stockholder's liability for debts, see note in 8 L.R.A.(N.S.) 263.

As to the right to enforce stockholders' liability outside of state of incorporation, see notes in 34 L.R.A. 737 and 33 L.R.A.(N.S.) 895.

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Consideration for stock issued.

A corporation, unless prohibited by constitutional or statutory provisions, may in good faith issue paid shares for the purchase of property or for services actually rendered; but where the stock is not paid for in full, either in money, property, or services, equity will inquire into the actual transaction, including the value of the property or services received as payment. In this case the stock issued to appellants in return for their services as directors, and purporting to be fully paid, was in fact bonus stock, and not paid for by any services rendered.

Presumption as to creditor.

When a creditor proves the issuance of stock to a stockholder, and that he subsequently trusted the corporation, it is presumed that he relied upon the subscription, and the representation that the stock was fully paid. The evidence in this case did not show that plaintiffs did not rely upon such subscription and representation when they extended credit to the corporation.

Finding sustained by evidence.

The evidence sustains the decision that appellants were stockholders of the corporation at the time the indebtedness to plaintiffs was incurred.

Admission of evidence.

There was no error in the rulings on the admission of evidence or in the findings.

Action in the district court for Ramsey county by three creditors of defendant mineral water company, incorporated under the laws of South Dakota, for the appointment of a receiver of defendant company and for an accounting of the amount unpaid and due from the individual defendants upon the stock in that company held by them respectively, and to recover judgment against the individual defendants respectively, for the amounts unpaid by them to the extent necessary to satisfy plaintiffs' claims.

Defendant Thompson, in his separate answer, alleged that he never in any way authorized or consented to the use of his name as a director of the corporation, never subscribed for or purchased any stock therein, but admitted the receipt of a certificate for 2500 shares by mail about December 29, 1908, and alleged that the indebtedness mentioned in the complaint was incurred prior to December 19, 1908.

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Defendant Conger, in his separate answer, admitted the receipt of a certificate of shares but alleged that the indebtedness mentioned in the complaint was incurred prior thereto; that he received the certificate upon the agreement that he should not be required to pay money therefor, but should pay in services in advising and directing as to the advertising and introduction of the mineral water. The reply to Conger's answer alleged that, if any such agreement as pleaded was made, such agreement was fraudulent as to plaintiffs.

The case was tried before Hallam, J., who made findings and as conclusion of law ordered judgment, in favor of plaintiffs for the amount of their respective claims, against defendants Conger and Thompson and two other defendants, including the costs of the receivership, but not to exceed $2,500 against any one defendant, directing how the amount due should be ascertained and assessed. The separate motions of the defendants for amended findings were denied. Defendant Thompson appealed from orders denying his motions to amend the findings of fact and for a new trial. Defendant Conger appealed from the order denying his motion for a new trial. Affirmed on both appeals.

Durment, Moore & Sanborn, for appellant Conger.

Farnam & Tappan, for appellant Thompson.

Russell L. Moore, for respondents.

BUNN, J.

This action was brought by plaintiffs, creditors of defendant Sanitas Mineral Water Company, a corporation, to recover of the other defendants, alleged to be stockholders, balances alleged to be due and unpaid on their stock. The case was tried to the court, and a decision rendered to the effect that plaintiffs were entitled to recover the amount of their claims from defendants Conger, Barringer, Ferring, and Thompson. Defendants Conger and Thompson each moved for amended findings and for a new trial, and each appealed from an order denying a new trial.

The facts are these:

Sanitas Mineral Water Company is a corporation, duly incorpo-

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rated in June, 1908, under the laws of South Dakota. One Sullivan was the promoter. His plan involved the bottling and selling of mineral water produced by a spring in southern Minnesota, and to obtain prominent druggists and physicians as directors and stockholders. Defendants Conger and Thompson were named as directors in the articles of incorporation, and on the letter heads of the company. July 27, 1908, resolutions were passed at a meeting of the board of directors allotting to each 2,500 shares of the capital stock of the corporation, and authorizing the secretary to "issue scrip" for said amount "for services as director of this company." Defendant Thompson was not present at this meeting, but defendant Conger was, and voted for the resolutions. The stock "allotted" by the resolutions appears from the stockbook to have been issued September 1, 1908. Conger's certificate was delivered to him November 28, 1908, and retained. Thompson's certificate was mailed to him by Sullivan on December 19, 1908, and retained, though Thompson testified to unsuccessful efforts to locate Sullivan, in order to return the certificate. Neither Conger or Thompson ever paid anything for his stock, nor had either performed labor or rendered services that can be considered as payment.

The Constitution of South Dakota provides that "no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received." The indebtedness of the corporation to the plaintiffs accrued in November, 1908. At least one of the claims was reduced to judgment, and an execution levied and returned unsatisfied. It is conceded that the corporation had no property within this state and is insolvent.

We will consider the two appeals together, in so far as the questions argued by either appellant are applicable to both.

1. The first contention is that the municipal court, in which the judgment obtained by plaintiff Fiterman was rendered, had no jurisdiction in that action of the defendant corporation. This claim is based upon the allegation in the complaint in the present case, found true in the findings, that the Sanitas Company on or about January 1, 1909, disposed of all its assets in the state of Minnesota; the argument being that a valid service of a summons cannot be made upon

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a foreign corporation unless it has property within the state. We think this point is unavailable to appellants at this time. It was not made at the trial, and, indeed, it seems to have been conceded that the judgment was regular and valid. In any event, there is no assignment of error that challenges the correctness of the trial court's finding that this judgment was "duly recovered."

2. It is vigorously urged that because the Sanitas Company is a foreign corporation, never authorized to do business in this state, this action will not lie. It is admitted that an action in the nature of a creditor's bill to reach unpaid subscriptions for the benefit of all the creditors of a foreign corporation may be maintained in this state. First National Bank of Deadwood v. Gustin Minerva Con. Min. Co. 42 Minn. 327, 44 N. W. 198, 6 L.R.A. 676, 18 Am. St. 510; Rule v. Omega Stove & Grate Co. 64 Minn. 326, 67 N. W. 60. But it is claimed that this is not such an action, but is an action by part of the creditors on behalf of themselves only, not to impound the unpaid subscriptions for the benefit of all the creditors, but to recover their own claims. In other words, the claim is that the action was brought under R. L. 1905, § 2865, instead of under R. L. 1905, § 3173.

It may be conceded that section 2865 applies only to domestic corporations. Rule v. Omega Co., supra. But admittedly an action under section 3173 might be maintained. The complaint, it is true, does not say that the action is brought on behalf of plaintiffs and all other creditors, nor does it demand any relief in favor of any creditors except the plaintiffs. But no objection was made by either demurrer or answer. If the complaint was deficient, it was so, not because it showed plaintiffs entitled to no relief, but because the action was not brought by or on behalf of all the creditors. It was in the nature of a defect of parties plaintiff, rather than a failure to state a cause of action, or a defect going to the jurisdiction of the court over the subject-matter. The complaint was clearly sufficient as a creditor's bill under section 3173, save for a possible defect of parties plaintiff or of parties defendant. These defects were waived by failing to object to them either by demurrer or answer. Benson v. Silvey, 59 Minn. 73, 77, 60 N. W. 847.

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3. It is contended that under the Constitution and statutes of South Dakota appellants are not liable to the corporation for the unpaid stock, and therefore are not liable at the suit of creditors. But the right of creditors to recover does not rest upon statute or contract. The Constitution of South Dakota expressly provides that no corporation shall issue stock, except for money, labor done, or money or property actually received. This prohibition is not, however, sufficient to create an implied contract that the holder of stock shall pay for it contrary to the actual contract of subscription, and no statute of South Dakota is pleaded or proved which creates such a contract. This was the exact situation in Hospes v. Northwestern Mnfg. & Car Co. 48 Minn. 174, 50 N. W. 1117, 15 L.R.A. 470, 31 Am. St. 637, where it was held that there was no ground for implying a promise by the holders of stock to pay for their shares but nevertheless that subsequent creditors, when they can be said to have trusted the corporation upon the faith of such stock, may recover, on the ground of fraud. It is clear, therefore, that the right of action in no wise depends upon statute or contract, but is grounded on fraud. There is, therefore, no distinction between foreign and domestic corporations in this respect, and no need of proving that the stockholders would be liable either to the corporation or to creditors in the state where it was organized. The remedy is controlled by the law of the forum. The Hospes case is conclusive against this contention of appellants, as, indeed, it is on most of the questions raised.

4. It is argued that the stock was issued to appellants for services rendered or to be rendered by them, and therefore that it is not unpaid stock. It is very clear that, under the constitutional provisions quoted, stock could not be issued for "services as director." Rogers v. Gladiator Co. 21 S. D. 412, 113 N. W. 86. And it is equally clear that services of no appreciable value were rendered the corporation by either appellant in payment for his stock. A corporation, unless prohibited by some constitutional or statutory provision, may in good faith issue paid-up shares for the purchase of property, or for services actually rendered; but when the stock is not paid for in fact, either in money, property, or services, equity will not regard the fictitious arrangement by which it is issued as fully paid up, and will

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inquire into the actual transaction, including the actual value of the property or services which were received as payment. Such inquiry in the instant case made it entirely clear that the stock was issued to appellants as bonus stock, in return for the use of their names as directors, and not in payment for any services performed or to be performed by them.

5. While the basis of the liability of the stockholders to the creditors for unpaid stock subscriptions is fraud, it is fraud in law, constructive fraud, rather than actual fraud; and it is not necessary for the creditors to prove affirmatively that they trusted the corporation in reliance upon the subscriptions. The presumption of reliance is raised when the creditor proves the issuance of the stock and that he subsequently trusted the corporation. It is true that this is not a conclusive presumption; it is one of fact, and may be rebutted. The creditor must have relied upon the representation that the stock issued as fully paid was so in fact, or he was not misled or defrauded; but he is aided by the presumption or inference that he did rely upon the representation. When the stock is issued after the debt is incurred, it is conclusive that the creditor did not rely upon the representation, and thereafter he could not have been misled, and cannot recover. And we think it is correct that whenever it appears that in fact the creditor did not rely upon the stock ownership, and the belief that the stock was paid for as represented, his action must fail. But it is not necessary for the creditor to plead or prove that he relied upon the representation, or the usual elements of actual fraud. And it is not fatal to his cause that as a matter of fact he had no personal knowledge of the amount of the professed capital stock, or of the shares held by any particular stockholder, or what was paid for them. Hospes v. Northwestern Mnfg. & Car Co., supra. Within the rules laid down in that case, we are of the opinion, and hold, that it was not shown as a fact that plaintiffs did not extend credit to the corporation in reliance upon the representation that the stock was fully paid. As before stated, the names of both appellants appeared as directors of the corporation in the articles and on its letter heads. And there was other evidence to support the presumption.

6. Were appellants stockholders at the time plaintiffs trusted the

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corporation? It is no defense that appellants had the stock thrust upon them, if they consented to it. It was undoubtedly the scheme of the promoter to obtain the prestige of their reputation as druggists of high standing in the cities, by interesting them in the project. But this could hardly be done without their consent. We have no doubt that both appellants became owners of stock in the company at some time during its brief career, and the only question of any doubt here is as to the time when they became such owners, with reference to the time the indebtedness to plaintiffs was incurred. The indebtedness of the corporation to plaintiffs was for merchandise sold and labor performed prior to November 28, 1908. As before stated, the resolution "allotting" stock to defendants Conger and Thompson was passed in July, 1908. The certificates were issued and dated September 1, 1908. Conger received his certificate November 28, 1908, and Thompson received his December 20, 1908. If, therefore, they were not stockholders until the actual receipt of the stock certificates, they are not liable in this action; but, if they became stockholders prior to the time plaintiffs trusted the corporation, they are liable.

It is well settled that, in order to constitute one a stockholder in a corporation, it is not necessary that the certificate to which he is entitled be issued, for it is merely evidence of his title to the stock shares. Holland v. Duluth Iron M. & D. Co. 65 Minn. 324, 68 N. W. 50, 60 Am. St. 480. The case cited is also authority for the principle that the entries in the books of a corporation are admissible for the purpose of showing who are stockholders, and for the rule that, when the name of an individual appears on the stock book of a corporation as a stockholder, the prima facie presumption is that he is the owner of the stock.

In the case at bar the stock book of the Sanitas Company showed the issuance on September 1, 1908, of 2,500 shares of stock to Conger and the same number of shares to Thompson. Applying the rule of the Holland case, this created a presumption that they were the owners of the stock. The burden of proving that they were not stockholders was upon defendants. As to defendant Conger, there is no fair question that he failed to rebut the presumption. Indeed, the

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evidence is sufficient in his case to show a parol subscription for the stock prior to the issuance of the certificate, and to show that he considered himself a stockholder after his agreement to take the stock. As to defendant Thompson, the evidence of a parol agreement of subscription is not so clear; but we must hold that the evidence sustains the decision of the trial court that he became a stockholder prior to the time the indebtedness to plaintiffs was incurred. In addition to the presumption created by the stock book showing him to be a stockholder, he was named as a director in the articles of incorporation, and there is credible evidence that in July, 1908, he was introduced by the promoter and president of the company to its attorney as a director, and failed to resent it, and also that about the same time he conferred with defendant Conger in regard to the affairs of the company. There is also evidence that he attended one or two meetings of the directors. He did not return the certificate mailed to him in December, though the company then and thereafter maintained an office in St. Paul.

7. We find no merit in any of the assignments of error relating to the rulings on the admission of evidence or to the findings, and not covered by what we have said in this opinion.

Order affirmed on each appeal.

HALLAM, J., having tried the case in the court below, took no part.

S. J. HAARALA v. SELMA MICKELSON and Another.[1]

January 17, 1913.

Nos. 17,776—(120).

Decision not sustained by evidence.

In this, an action to adjudge and foreclose a vendor's lien on real property, the evidence examined, and *held* not to sustain the decision.

Action in the district court for Otter Tail county to recover $2,385, the unpaid purchase price of certain land, to obtain a vendor's lien

[1] Reported in 139 N. W. 504.

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thereon for that amount and to foreclose the lien. The answer alleged that the consideration named in the deed was not intended to be and was not the consideration agreed upon between plaintiff and defendant Selma; that the same was inserted as an arbitrary sum at the suggestion of plaintiff, for the purpose of showing the conveyance was made for a valuable consideration and for no other purpose; that the real consideration was in part the love and affection of plaintiff for her daughter, the defendant Selma; that a further consideration moving from defendant Selma to the plaintiff for the conveyance consisted of services theretofore rendered plaintiff and her husband by defendant Selma and her husband at the special instance and request of plaintiff and the father of defendant Selma, for a period of three years prior to the execution of the deed; that at the time of conveyance defendant Selma also paid plaintiff the sum of $100, good and lawful money, and it was then agreed between plaintiff and defendant Selma that said sum should be in full of all demands for the conveyance. The answer further alleged that defendant Selma and her husband returned to Minnesota from the state of Washington, at the special instance and request of plaintiff and the father of defendant Selma, with the understanding that plaintiff had purchased the land for her daughter and would give it to her on condition that she should return and make her home there near the home of plaintiff; that defendants left Washington and returned to Minnesota, took possession of the land and have since made the same their home, cultivated and improved the land, relying on the promise; that for three years and upwards prior to the conveyance each of the defendants rendered valuable services to plaintiff and her husband at their special instance and request, and by virtue of taking possession of the property, cultivating and improving it under those terms and conditions the defendant Selma became the equitable owner of the property and entitled to a conveyance, and the conveyance was made to her in recognition of the agreement and of the services rendered, and in consideration of love and affection and the sum of $100. The new matter in the answer was denied in the reply.

The case was tried before Nye, J., who made findings of fact and

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ordered judgment in favor of plaintiff for the sum of $2,385, that she have a vendor's lien upon the premises conveyed for that amount, and that the lien be foreclosed by a sale thereof. From a judgment entered pursuant to the order for judgment, defendants appealed. Reversed and new trial granted.

O. J. Larson, M. E. Louisell and *John Saari,* for appellants.

Anton Thompson, for respondent.

HOLT, J.

Lisa S. Kivijarvi deeded 80 acres of land in Otter Tail county to her daughter, the defendant, Selma Mickelson, on the 21st day of September, 1910. This action was brought by the mother for a vendor's lien and the foreclosure thereof against the land conveyed for the alleged purchase price of $2,385. Findings were made for plaintiff, but before judgment she died, and by stipulation the administrator of her estate was substituted as plaintiff, and judgment entered, from which this appeal is taken.

The assignments of error center upon the sufficiency of the evidence to sustain the findings to the effect that there was a sale under the terms of which there was due and payable on the delivery of the deed the sum of $2,385, so as to support the judgment for foreclosure as decreed; or was the transaction a gift, as defendants contend?

The record shows that the mother carried on a farm in Otter Tail county, upon which she resided with her husband. She, however, was the owner of the farm, together with other property, and appears to have been the actual head of the family. Both she and her husband were close to 80 years of age at the time of the transaction. There were several children, and the mother had, at times, assisted the different ones, including this daughter, with money and property. Three or four years before this deed was executed, defendants were in the state of Washington, and were apparently in hard circumstances. Mrs. Kivijarvi admitted that she then wrote them that she had bought these 80 acres across the road from her own farm for them to live on, and sent them money, so that they could come back to Minnesota. When they came, she says she took them to this land

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and said: "Here is your house; go in there and live." The defendants lived there a little over a year; then, because of some disagreement with the mother in regard to the right to wood and stable room, they left, and for about two years rented a farm in the neighborhood. In September, 1910, when Mrs. Kivijarvi was threshing on her farm, she sent for this daughter to help her. The husband of Selma also came there. It was then decided to make a deed to the 80 acres to the daughter. The mother and daughter, with their husbands, drove to Otter Tail, where, at the bank, the deed was drawn, executed, and delivered, and the daughter paid $100 to the mother. This money the latter counted and accepted. The daughter says that when they got outside the bank the mother gave back the money, while the latter claims that, as she went to get into the wagon to go home, she dropped the money, wrapped in a handkerchief, in the wagon box, and the daughter picked it up and kept it. This $100 was not asked for by the mother again. The defendant's contention is that the deed was a gift; that the $100 was passed in the bank because all understood that, to make the transaction legal, a money consideration was necessary; and that the amount of $2,385 was inserted in the deed for the purpose of concealing from the other children that the land was given to the daughter. The defendants also claimed that, upon suggestion of the mother, it was agreed to carry out that plan by telling the brothers of defendant Selma, and others, that it was a cash sale.

There is no claim of fraud, deception, or undue influence in the transaction. The intention was to convey the land. And if the record showed nothing more than the fact that the consideration stated in the deed was not paid, the inference could well be drawn that there was a sale, and that the agreement was that the payment of the price was to be made immediately on delivery of the deed. Sennett v. Shehan, 27 Minn. 328, 7 N. W. 266. But, conceding that there was a sale, and not a gift, the evidence, in our opinion, clearly points to the conclusion that in no event could there have been an understanding or agreement that the balance of the price, namely, $2,285, was to be paid when the deed was delivered, or within a short time thereafter. The defendants could not get to

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Minnesota a few years before this without the mother's assistance. The three years they had lived as renters had evidently not afforded much accumulation, for the mother admitted she did know that the daughter could not then pay. There could not, therefore, have been an understanding that the sale was to be for cash; hence, if one was made, it was on time. If the latter, we would expect some conversations relative to the time of payment of part or all of the purchase price, and the rate and time of payment of interest on deferred payments. But the record is wholly devoid of any testimony of that kind.

It is also hard to believe that one who had had several land transactions, like plaintiff, and who had accumulated property, so as not only to have a fair competence for herself and husband, but so that she could, from time to time, assist the children, was not acquainted with the usual mode of evidencing a transaction like the one in hand by note, mortgage, or other writing. The only question put to Mrs. Kivijarvi in reference to when the balance was to be paid was on cross-examination, when she was asked: "Well, when did Selma promise to pay the balance? Answer: She didn't know when she would pay the balance."

It is true that all parties to this litigation labored under the disadvantage of testifying through an interpreter, and also that they were more or less strangers to the legal requirements in transactions involving matters now under consideration. Therefore the improbable in the situation of the parties and the contradictions in the testimony of Mrs. Kivijarvi should not reflect so strongly against her theory of the right to prevail as if she were acquainted with our language and experienced in our ways of doing business. But, making all due allowance for this, there still appears such entire lack of evidence to support the essential finding on which the judgment as to the foreclosure of the vendor's lien must rest, namely, that the purchase price was to be paid immediately upon the delivery of the deed, that the judgment cannot stand. The court, in other words, imported into the transaction a provision which was neither discussed nor agreed upon by the parties themselves, and which the evi-

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dence affirmatively shows could not have been within the contemplation of the parties.

Furthermore, if there was a sale, it is difficult to escape the conviction that $100 was then paid, so that in no event could a vendor's lien for a sum including that amount be adjudged. Mrs. Kivijarvi's version of how that money was paid, and how it thereafter got into her daughter's possession, and remained there without the slightest protest, or request to return it, ought to extinguish the vendor's lien to that amount at least. There is no claim that the daughter repossessed herself of this $100 by trickery, fraud, or force. Nor is it easy to reconcile the mother's conduct with reference to this alleged payment on any other theory than that she regarded the money all the time as her daughter's, used merely in the bank to lend legality to the transaction. On cross-examination she stated that she gave the $100 back to Selma, according to the understanding.

We do not desire to modify in the least the rule that is stated thus in Koller v. Chicago, St. P. M. & O. Ry. Co. 113 Minn. 173, 180, 129 N. W. 223:

"We are not required to reconcile the conflicting evidence, nor to solve doubts arising therefrom. It was for the jury and the trial court to determine the facts. We have only to determine whether the evidence, taken as a whole, fairly tends to support the jury."

To the same effect, among other decisions, is Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93, wherein it is held that "we have only to inquire whether the evidence is clearly and palpably against the findings. If there be evidence in the record fairly tending to support the findings, they must be sustained."

Aside from the challenged finding that there is no evidence to show that the purchase price was due immediately upon the delivery of the deed, we think the evidence in regard to there being a sale, instead of a gift, is so unsatisfactory that the findings made cannot

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be held to be fairly supported. Mr. Kivijarvi, who was present and executed the deed, when asked whether anything was said about how defendants were to pay for the land, answered: "Nothing at all * * * never said anything to me" whether it was for cash, or what was to be given for that. On cross-examination he testified that he understood his wife had given the property to the daughter, and that the land belonged to Selma and was given to her until before the action was brought. Mrs. Kivijarvi, although claiming that she made a sale to the daughter of the farm for the price she had bought it for, namely, $2,385, gave testimony which apparently contradicted this, as already indicated, and as appears from these questions and answers on cross-examination, viz.:

"Now, didn't you give this land to Selma with the understanding that she was to live there, and keep the land and not dispose of it?" Answer: "Yes, sir."

Question: "Didn't you tell Selma not to sell the land to John [the brother]—that you did not want him to buy it?" Answer: "She can't remember."

Question: "You never asked for this $100 again, did you, that you gave back to Selma at Otter Tail?" Answer: "I can't remember."

Question: "Now, last winter, after this summons and complaint was served on Selma, didn't you offer to buy that land back from Selma?" Answer: "Yes, sir; but it was the understanding not to sell to a stranger, that she would take it back."

Question: "And that is why you brought this suit to prevent that sale?" Answer: "Yes, sir."

Question: "If they had lived on the land and not attempted to sell the land, then you would not have proceeded with this suit?" Answer: "She don't think so."

Question: "The intention was that the land should be kept by Selma, and never be sold to strangers; that was your intention?" Answer: "Yes, sir."

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We conclude that there should be a retrial of the case on the ground that the decision is not sustained by the evidence.

Judgment is reversed, and a new trial awarded.

KATE SINA v. AARON CARLSON.[1]

January 17, 1913.

Nos. 17,791—(158).

Uncontradicted evidence not conclusive.

Testimony of both the owner and the driver of a team that the driver was acting without authority from the owner is not conclusive, though there is no other direct evidence on that subject. Facts and circumstances may overcome this direct testimony.

Question for jury.

O., a farm hand, driving a farm team, conveyed a load of his employer's furniture from his farm to his city home. Both testified that O. had no authority to do so. On returning, he collided with plaintiff's buggy. O. had full charge of this team on the farm. He had frequently driven it on the road. His testimony as to circumstances under which he came to convey

[1] Reported in 139 N. W. 601.

Note.—The liability of a master for tort committed by servant in course of his employment, and with a view to the furtherance of his master's business, but contrary to the master's express instructions, is the subject of a note in 18 L.R.A.(N.S.) 416.

On the question of the liability of master for injury from the sportive manner in which a servant performs an act done in the discharge of his duty, see note in 13 L.R.A.(N.S.) 1193.

The authorities on the liability of owner for injuries caused by automobile while being used by servant or third person for his own business or pleasure are collated in notes in 33 L.R.A.(N.S.) 79 and 37 L.R.A.(N.S.) 834.

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his employer's goods on this occasion was denied. *Held:* A question for the jury whether he was acting within the scope of his agency.

Master and servant.

Where an employee is permitted, during the course of his employment, to use his employer's vehicle to facilitate the performance of necessary errands of his own, the relation of master and servant exists while he is so engaged.

Action to recover $5,025 for personal injuries. The complaint alleged that at the time of the accident defendant Olson was acting in his capacity of servant and employee of defendant Carlson and was engaged in the performance of his duties as such servant and employee. The separate answer of defendant Carlson alleged on information and belief that, if plaintiff sustained the injuries alleged, they were sustained solely by her own carelessness and negligence. The case was tried in the district court for Hennepin county before Hale, J., who denied defendant Carlson's motion for an instructed verdict in his favor, and a jury which returned a verdict for $750 against both defendants. From an order denying the motion of defendant Carlson for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

A. B. Darelius, for appellant.

Stan J. & Stan D. Donnelly, for respondent.

HALLAM, J.

On November 14, 1910, plaintiff was driving with a horse and buggy on a country road. Defendant Olson, driving a team belonging to appellant, undertook to pass her from behind. He turned to the right, instead of to the left, and in passing struck the wheel of plaintiff's buggy and caused her to be thrown and to sustain some injury. Olson was in the employ of the appellant on his farm, and he had been in such employ nearly four years. This was one of the farm teams. He testified that he took care of the horses, drove them, and had charge of them; that he sometimes went to Minneapolis or New Brighton for provisions for his family, and when he did so would drive appellant's horses. One witness testified that he had seen Olson a number of times drive on this same road with this same

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team, sometimes as often as twice a week. Olson further testified: "Mr. Carlson told me three years ago to stay on the farm and take care of the farm, because I had so much to do on the farm, so he didn't want me to go to town." Carlson testified that Olson was hired to stay on the farm and take care of the farm and the stock and the cottages, and not to be on the road. He testified that he did not know that Olson went into town on November 14 until some time later.

On this day Olson had taken to Minneapolis a load of furniture belonging to appellant, taking it from the farm to appellant's home in Minneapolis. He testified: "It was getting late in the fall, and Carlson had ceased living there for the summer and was taking some little things to town." He testified that he was not working for Carlson on that day, but for himself; that Carlson had not instructed him to take his furniture to town; that a teamster from Carlson's shop, Rudolph Anderson, came out to bring a load of manure and to take this furniture in, but that Olson told him that he would take it in. "The way I came to take it in," he said, "it was cold and the ground was wet and my kid go to school and he didn't have no rubbers and I didn't have no rubbers or overshoes and neither my wife." Another witness, however, testified that Olson left with the load several hours before Anderson arrived.

The jury returned a verdict in favor of the plaintiff and against both Olson and appellant. Appellant moved in the alternative for judgment notwithstanding the verdict or for a new trial. Both motions were denied. Carlson alone appealed.

There was ample evidence that Olson was negligent. The only question in the case is: Was the appellant liable for Olson's negligence? Appellant contends that Olson was acting outside of his employment and that he alone was liable.

The law on this subject is well settled in this state. The rule is that the master is responsible for the torts of his servant done within the scope of his agency; that is, in the course of his employment or in the line of his duty, with a view to the furtherance of his master's business, and not for a purpose personal to himself. The fact that the servant in committing the tort may have exceeded his actual

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authority, or even disobeyed his express instructions, does not alter the rule. Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Crandall v. Boutell, 95 Minn. 114, 103 N. W. 890, 5 An. Cas. 122, note; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133, 5 L.R.A.(N.S.) 598; Barrett v. Minneapolis, St. P. & S. S. M. Ry. Co. 106 Minn. 51, 117 N. W. 1047, 18 L.R.A.(N.S.) 416, 130 Am. St. 585; Penas v. Chicago, M. & St. P. Ry. Co. 112 Minn. 203, 127 N. W. 926, 30 L.R.A.(N.S.) 627, 140 Am. St. 470. The expression "in the course of his employment" means while engaged in the service of the master; that is, while engaged generally in the master's work. Slater v. Advance Thresher Co. 97 Minn. 305, 312, 107 N. W. 133, 5 L.R.A.(N.S.) 598. The liability does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business. Morier v. St. P. M. & M. Ry. Co. 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793.

Both appellant and Olson testified that Olson was forbidden to do teaming on the road, and that under no circumstances was he authorized to do so; but the jury was not bound to accept this testimony as true. There was ample evidence from which they might find the facts to be otherwise.

Whether he was in fact acting within the scope of his agency was fairly a question of fact for the jury. Olson was in appellant's employ, and was driving appellant's team. There was evidence that he had driven this team upon the road so frequently that the appellant's assent to his doing so might fairly be inferred. On this day he was admittedly performing a service for appellant. He was admittedly acting, in part at least, in furtherance of appellant's business, and not altogether for the purposes personal to himself. His own explanation of the circumstances under which he came to perform this service is not altogether satisfactory, and is contradicted by another witness. We hold that the finding of the jury that he was within the course of his employment, and within the line of his duty, is sustained by the evidence. See Gerhardt v. Swaty, 57 Wis. 24, 37, 14 N. W. 851; Hiroux v. Baum, 137 Wis. 197, 118 N. W. 533, 19 L.R.A.(N.S.) 332.

This verdict may be sustained, even though Olson's purpose in

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making this trip was solely to make purchases for his household, and though he had no authority or direction to carry appellant's furniture to town. The evidence is that he did habitually drive appellant's team to Minneapolis and New Brighton for similar purposes. There is ground for the inference that he did so with appellant's consent. He was appellant's employee; his time was his employer's. He was using his employer's team for a purpose consented to by his employer, and in order to facilitate the performance of an errand of his own which he was permitted to take time to perform. In so facilitating his own business, he was in fact facilitating his employer's business as well, and the purpose was not a private one, in which his employer had no interest. The rule is that, if within the course of his employment an employee is permitted to use his employer's vehicle to facilitate the performance of necessary errands of his own, he is still an employee while so doing, and the principle of respondeat superior applies. This rule has frequently been applied to cases where railway employees have been permitted to use an engine in going to and from meals. (E. St. Louis Con. Ry. Co. v. Reames, 173 Ill. 582, 586, 51 N. E. 68; Reilly v. H. & St. J. Ry. Co. 94 Mo. 600, 608, 609, 7 S. W. 407; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 An. Cas. 1227); or to and from work (Gilshannon v. Stony Brook, 10 Cush. [Mass.] 228; Ewald v. Chicago & N. W. Ry. Co. 70 Wis. 420, 428, 36 N. W. 12, 591, 5 Am. St. 178); and generally to the case of employees who are permitted to use the employer's instrumentalities for similar purposes (Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; Morier v. St. Paul, M. & M. Ry. Co. 31 Minn. 351, 353, 17 N. W. 952, 47 Am. Rep. 793).

Such an instrumentality is said in one case to be a "means, facility, and advantage, to which he was entitled by reason of his being an employee or servant, which entered into and became a part of his contract of employment, or were incidental and necessary to it" (Ewald v. Chicago & N. W. Ry. Co. supra); and in another case "a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service and is equally connected

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with it, and the relation of master and servant" (Gillshannon v. Stony Brook, supra).

The order appealed from is affirmed.

R. LUNSCHEN v. G. L. PETERSON and Another.[1]

January 17, 1913.

No. 17,794—(142).

Verdict sustained by evidence.

A verdict finding that the summons was not served in an action wherein judgment was entered by default, and upon execution issued thereon the land involved in this action was sold, *held* sustained by the evidence.

Service of process — what evidence admissible.

Testimony as to the value of lands owned in the county, by the one upon whom service of a summons in an action for money judgment purports to have been made, *held* admissible as indirectly bearing upon the probability of such service, in view of his situation and subsequent conduct.

Special findings.

Although by agreement a suit in ejectment and an action to remove a cloud were merged for the purpose of trying one determinative issue, it was not error to refuse a request that the jury find specially on that issue, where the court instructed the jury to predicate the general verdict solely on the one issue tried.

Action in the district court for Lincoln county to vacate a judgment for $770.75 against plaintiff, to cancel and expunge from the record an execution, levy and certificate of sale thereunder. The amended complaint alleged that the judgment was null and void because no summons was ever served on plaintiff; that plaintiff never appeared in the action either in person or by attorney; that the defendant never acquired or had jurisdiction over his person; that the value of the real estate involved was over $10,000; set out the

[1] Reported in 139 N. W. 506.

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facts concerning the docketing of said judgment, the issue of execution, the sale of the premises thereunder by the sheriff for the sum of $402.70, the execution and record of the sheriff's certificate of sale; that by reason of these facts the court in making, entering and docketing the judgment did not have jurisdiction of the plaintiff, and by reason of the fact that no copy of the execution and levy indorsed thereon was ever served on the plaintiff, and by reason of the fact that no notice of the sale was ever served on the plaintiff or posted or published as required by law, the judgment, execution, levy and sale thereunder were wholly void, but that the want of jurisdiction and irregularities did not appear upon the record, and that such judgment, execution, levy and sale together with the certificate constitute a cloud on plaintiff's title to the premises. The defendant demurred to the amended complaint.

The case was tried before Olsen, J., and a jury which returned a verdict that plaintiff was the owner of the property described in the complaint and entitled to recover immediate possession thereof from the defendants. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial they appealed. Affirmed.

Louis P. Johnson and *Lind, Ueland & Jerome,* for appellant.

R. F. Schulz and *Johnson & Lende,* for respondent.

HOLT, J.

Two actions were brought by plaintiff against G. L. Peterson; one being for the recovery of possession of 173 acres of land in Lincoln county, in which case Peterson's tenant was also a party defendant, and the other to remove a cloud from the title to said land. When the cases were reached for trial, it was arranged to have both disposed of by the trial of one issue to the jury then impaneled.

The issue then agreed upon as determinative of each case was whether or not the summons had been served upon R. Lunschen, in an action wherein the defendant Peterson herein was plaintiff and the plaintiff herein was defendant, brought in the district court of said county on March 10, 1910, to recover on a promissory note given by R. Lunschen to the father of defendant Peterson, and transferred

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by the father to the son prior to the commencement of the action. In this last-named action a judgment was duly rendered April 20, 1910, on default, for $770,75, execution issued, and thereunder the land above mentioned, then owned by Lunschen, was levied upon and sold to the defendant Peterson on June 20, 1910. No redemption was made. The record does not disclose when Peterson's tenant took possession, or when Lunschen first discovered that fact, or when he first learned of the judgment and execution sale. The actions herein were begun in February, 1912. It is conceded that defendant Peterson's only claim to the land rests on the said execution sale. Hence, if the judgment under which the sale was made was void for want of jurisdiction, the sale thereunder conferred no rights in the land. The jury found a verdict that plaintiff was the owner and entitled to recover the immediate possession thereof from the defendants. The defendant Peterson appeals from the order denying his alternative motion for judgment notwithstanding the verdict or for a new trial.

The three main contentions of defendant are: (a) That the verdict is not sustained by the evidence under the law applicable to the issue here involved; (b) that the court erred in receiving evidence as to the value of the land; and (c) that the court should have submitted the special verdict requested by defendant to the jury.

The jury was given the correct rule by which to determine the issue litigated. The court, after stating that the sheriff's certificate was strong prima facie evidence of the fact of service upon Mr. Lunschen, charged that the burden of proof was upon plaintiff to show by clear and satisfactory evidence that no summons was served upon him in the action wherein the judgment was rendered, and that a mere preponderance of the evidence in his favor was not sufficient. This instruction is conceded to be correct by appellant, and in accord with the rulings of the court in Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541; Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060; Knutson v. Davies, 51 Minn. 363, 53 N. W. 646, and Vaule v. Miller, 69 Minn. 440, 72 N. W. 452. But the contention is that the evidence, instead of being clear and satisfactory in favor of the verdict, is almost conclusive against it.

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Plaintiff maintained that he was in Iowa at the time the summons purports to have been served upon him at Ivanhoe, the county seat of Lincoln county, this state. The sheriff, who personally made the service, had known Mr. Lunschen for more than two years. His records or books corroborated the return. The hotel register at Tyler, a village only 15 miles from Ivanhoe, has a signature on March 11 strikingly similar to an admitted genuine signature of Lunschen when he stopped at the same hotel on March 18. A disinterested witness who knew him stated that he saw him on the 10th, the day of the purported service, in Ivanhoe. The testimony of several witnesses that on March 9 he was within 12 or 15 miles of Ivanhoe and Tyler at an auction near Elkton in South Dakota, where he bought sheep, all tend to prove that plaintiff was not in Iowa, as he claims, at the time of the alleged service. And it must be conceded that the printed record and original exhibits presented in this court lend strong color to the contention that plaintiff was not testifying truly when he stated that the summons had not been served on him and that he was not in the state at the time.

On the other hand, we have the fact that on March 8 plaintiff was still in Iowa, because he then executed an appeal bond in a suit there had by his son; the plaintiff's positive assertion that he was not served, and was not away from Tipton, Iowa, till several days after March 10; the testimony of members of his family corroborating his presence in Iowa; and, more especially, plaintiff's conduct subsequent to the purported service. In February, 1910, some correspondence passed between the then holder of the note, the father of the present defendant, and this plaintiff; also a letter was written by an attorney in regard to the note. Plaintiff testifies that soon thereafter, whether before or after March 10 is perhaps uncertain, he went up to see Peterson, Senior, about the note. The correspondence was not offered, but enough is shown to indicate that plaintiff did not wilfully let matters go by default, and that he was ignorant of the fact that Peterson, Senior, had transferred the note to the son. This again appears from the fact that after the execution sale plaintiff tried to find defendant's father, to pay, as he claims, $300 on the note. When he found that Peterson, Senior, had gone out to his farm, he left the money at the bank at Elkton. This

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money the defendant herein obtained and applied, as he says, on the judgment. Not the slightest inference may be drawn from the record that at this time plaintiff had any notice or knowledge that there was a judgment against him, or that the land had been sold. The plaintiff, though apparently not quite at home in the English language, shows that he was familiar with business and had had experience in litigation. The farm appears to have been worth more than $10,000. There is nothing in the record to show any incumbrance thereon. Under these conditions, there is much in plaintiff's conduct and situation which strongly corroborates his contention that he was not served with summons in the suit brought against him by Peterson.

In examining the evidence with a view of determining whether or not the decision finds sufficient support therein, the appellate court ought not to lose sight of the inherent justice of the result reached in the trial court. If the party defeated in the lawsuit has lost no property to which he is morally entitled, and the prevailing party has obtained no more than he, in justice, ought to have, the appellate court should long hesitate to disturb a verdict, approved by the trial court, on the sole ground that the evidence is not sufficient to support it. Unless we can say upon the record in the instant case that plaintiff and his witnesses are clearly mistaken, or else wilfully falsified, there is ample testimony to sustain the verdict. The credibility of witnesses was for the jury to determine as well as to apply the rule given by the court that, in order for plaintiff to prevail, the testimony of no service of the summons in the suit mentioned must be clear and satisfactory.

Over the objection of defendant, plaintiff was permitted to testify that the farm was worth from $60 to $65 an acre. The defendant earnestly contends that this evidence was irrelevant and immaterial to the issue as to whether the summons in the suit on the promissory note was served or not, and that it strongly tended to prejudice and inflame the jury. It may be doubted that, even if there was technical error in receiving evidence of value, any prejudice in fact resulted to defendant; for it may be safely asserted that any ordinary jury

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in our rural districts have a fair knowledge of the general value of the farms or farming lands in their county. But within the rule permitting the trial court a wide latitude in the introduction of testimony indirectly bearing upon the issue, we are of the opinion that no error was committed in showing the conditions existing.

Even if Lunschen had no defense to the promissory note, so that no inference could be drawn from a failure to answer a summons duly served, it is not the ordinary conduct of men, possessed of valuable property subject to sale upon judgment, such as was shown here, to permit the whole to be irretrievably lost on a small debt. It seems to us that the court did not err in permitting evidence of the true situation, namely, that Lunschen owned valuable property in the county, where it is claimed that he was sued, and that he made no effort to protect this property, although he apparently sought to pay off the debt to the original holder of the note. His conduct, in view of the situation, is persuasive, and, to throw light on his conduct, the location and value of the property which might, by virtue of the litigation, be subject to loss, bears at least indirectly and materially on the issue tried.

On the oral argument the contention was advanced by defendant that the record fails to show that plaintiff suffered any great loss by the execution sale, for the farm may have brought all it was worth. There is no testimony as to the amount for which it was bid in at the sale by defendant, or that it was subject to any incumbrance. In the complaint to remove a cloud, it was alleged that the sale was for $402.70. The demurrer interposed admitted this, but at the trial it was agreed that the answer in the ejectment case, being a general denial, should stand in both. We have, however, the admission that the judgment was for $770.75, and that after the sale there was still a deficiency large enough to apply the whole sum of $300 thereon. The inference is therefore warranted that the sale brought no more than $470.75 and costs.

The last objection urged is that here, where an action at law and a suit in equity were merged for the purpose of trial, and by agreement the sole issue tried was whether or not Lunschen was served with summons in the action wherein the judgment was rendered

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under which the land was sold to defendant, there should have been no general verdict, but merely a special finding on the single issue tried. We do not hold that the practice contended for would not have been proper, but we are of opinion that practically such was the effect of the procedure had.

The court in clear and unmistakable terms and with legal accuracy, instructed the jury that the only issue for them to try was whether or not there had been a service of the summons in the action of Peterson v. Lunschen, and as to that issue the burden was upon the plaintiff herein to prove by clear and satisfactory evidence that it was not served, in order to render a verdict for possession of the land; otherwise, the verdict must be for defendant. If it was desirable to keep from the jury the effect of their verdict, in order that the same should be based on the unvarnished truth as to the facts, and not be influenced in any degree by that sense of fair play and justice which actuates the ordinary man and juror, we do not think this object could have been any better subserved by the course urged by appellant. We doubt whether any jury can be found dull enough not to understand the legal consequences of an answer to the special finding requested by defendant.

The verdict herein undoubtedly appeals to the innate sense of justice of every one. The only debatable question is whether the evidence upon which this result is based, measured by legal standards, is clear and satisfactory. We have, however, concluded that, under the rule governing a court of review, we may not say that the verdict, approved by the trial court, is not sufficiently supported by the evidence.

The order is affirmed.

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B. PRESLEY COMPANY v. ILLINOIS CENTRAL RAILROAD COMPANY.[1]

January 17, 1913.

Nos. 17,816—(150).

Transportation of berries — evidence.

Plaintiff's evidence showed that a shipment of strawberries was inspected at point of shipment by an association inspector. The shipper testified that he also inspected them, and that they were loaded in good condition and perfectly sound, though he personally inspected but one or two cases in each wagon load. Another witness testified to the general good condition of berries at point of shipment at that time; another that the damaged condition in which they arrived was due to heat. Defendant's witness testified solely from records that the car was kept properly iced. *Held*, the evidence sustained a finding that the damaged condition in which they arrived was due to negligent transportation.

Admission of evidence.

A witness gave testimony from an unverified memorandum, when objected to on that ground, only as to a matter not in controversy. *Held* no material error.

Book entry from temporary slips.

Plaintiff's manager testified that a certain book entry was a record kept in plaintiff's office, made at the time of the transaction, from temporary slips that are not preserved, made by a clerk in the office in his presence, and that it was true and correct. *Held* sufficient, though he could not state what particular clerk made the entry.

Evidence admissible.

Evidence as to the customary time for unloading a car of damaged berries *held* not error.

Failure to present claim — burden of proof.

The burden of proof is on the defendant to show that plaintiff failed to present its claim within the time provided by the bill of lading. *Held* that, as a matter of law, the proof in this case was not sufficient to sustain a finding that a claim was not so made.

[1] Reported in 139 N. W. 609.

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Action in the municipal court of St. Paul to recover $287.70 damages to a carload of strawberries alleged to have been negligently delayed in transportation, and because defendant did not exercise due care for the preservation of the berries while in transit. The answer alleged that the berries were accepted for transportation at a reduced rate under a bill of lading, by the terms of which claims for damage or delay must be made in writing to the carrier within four months after delivery of the property; that the bill of lading was executed in the state of Louisiana and under the laws of that state is valid and binding upon the parties to the action; that plaintiff failed to make claim within the time and in accordance with the terms of the agreement; that the berries were transported and delivered to the Chicago, Milwaukee & St. Paul Railway Company at Dubuque, Iowa, in as good condition as when they were delivered to it for shipment, except for such changes in their condition as may have occurred by reason of matters beyond defendant's control. The case was tried before Finehout, J., and a jury which rendered a verdict in favor of plaintiff for the sum of $296.79. From an order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Butler & Mitchell and *John B. Sanborn,* for appellant.

T. P. McNamara, for respondent.

HALLAM, J.

This action is brought to recover damages from negligent transportation of half a carload of strawberries, shipped April 20, 1909, from Independence, Louisiana, to St. Paul. There was no delay in transportation, and the damages are claimed to have been caused by heat, due to insufficient icing of the cars. The jury found for plaintiff. Defendant appeals.

It is admitted that, when the berries arrived in St. Paul, they were moldy and soft. Appellant contends there is no evidence sufficient to sustain a finding that this condition was caused by negligent transportation. It is conceded that strawberries in sound condition may be safely transported from Independence to St. Paul. It follows that either the berries were unsound when shipped, or they

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were improperly carried. The verdict was necessarily a finding that they were sound when shipped, but were improperly carried.

We hold that the evidence sustains these findings: The berries were shipped by a Mr. Harpole, who bought them for respondent and superintended their loading. He testified that the berries were bought from growers by an association and inspected by the association inspector. He inspected them also, examining one or two cases from each wagon load. He stated positively that they were loaded in good condition and perfectly sound. Another witness, Mr. Terry, a fruit broker at New Orleans, said the condition of fruit generally at Independence at that time was good. There is also evidence that the soft and moldy condition in which the berries arrived was due to heat. The evidence is sufficient to make out a case. Appellant offered no testimony as to the condition of the fruit when loaded. The only evidence submitted by appellant was as to the manner in which the car was transported and iced. This evidence tended to show that the berries were properly transported. It was, however, based entirely on appellant's records, and in no measure on the recollection of any witness, and these records were in some respects conflicting. We cannot say as a matter of law that defendant's evidence was conclusive, and we sustain the finding of the jury.

Error is assigned because Mr. Harpole was permitted to testify, using the records of the association as a memorandum, without any proof as to their verity. It may be conceded that no foundation was laid for the use of this memorandum. The error is not material, for the only evidence the witness gave from this memorandum, which was objected to on this ground, was as to the number of crates in this car. This was not a matter of controversy in the case.

Error is also assigned because the court received in evidence a sheet from plaintiff's loose-leaf ledger, on the ground that it was not shown to be an account book within the terms of R. L. 1905, § 4719. This was received for the sole purpose of showing the amount received by plaintiff from the sale of the berries. This evidence bears only on the measure of damages. Plaintiff's damage was the difference between the value of the berries as they would have arrived, if carried properly, and their value as they did in fact arrive.

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There was evidence that, as they arrived, they were worth approximately one dollar a case, or $344 in all; that Dore & Redpath received for the other half of the car $415.75. There was no other evidence as to the value as received, except this ledger entry, and that showed that plaintiff received $499 for its half of the car. Manifestly the evidence would have been more favorable to plaintiff, had defendant's objection been sustained.

The ledger entry was, however, properly received. It was, in fact, an original entry. Mr. Graupman, plaintiff's manager, testified in substance that this ledger is a record kept in plaintiff's office; that the entries in it are made at the time of the transactions, from temporary sales slips which are not preserved; that this entry was made by a clerk in the office; that he did not know whose handwriting it was; that he saw it at the time it was made up; and that it was a true and correct statement of the account of the sale of this car. The only question arises from the fact that the witness stated that he did not know the handwriting of this entry. Taking all his testimony together, it is apparent that he meant that, while the entry was made by some clerk in the office and necessarily in the handwriting of such clerk, he could not tell which one. The foundation was sufficient.

Error is assigned because the court received evidence as to the customary time for unloading a car of damaged berries. This testimony had some bearing on the question whether plaintiff proceeded with proper dispatch, and it was not error to receive it. Armstrong v. Chicago, M. & St. P. Ry. Co. 45 Minn. 85, 47 N. W. 459; Hinton v. Eastern Ry. Co. 72 Minn. 339, 75 N. W. 373; Anderson v. Fielding, 92 Minn. 42, 99 N. W. 357, 104 Am. St. 665.

Error is assigned in that the court refused to submit to the jury the question as to whether respondent filed its claim within four months after delivery of the property, as provided by the bill of lading. The burden of proof as to this was upon appellant. Hatch v. Railway Co. 15 N. D. 490, 107 N. W. 1087; Texas v. Crowley (Tex. Civ. App.) 86 S. W. 342. The only evidence was as follows:

On cross-examination of Mr. Graupman, a statement of claim

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against the Chicago, Milwaukee & St. Paul Railway Company, dated December 13, 1909, was shown witness, and the following dialogue ensued: "Q. Did you file a claim with either of the companies, the Illinois Central or the Chicago, Milwaukee & St. Paul? A. File a claim? Q. Yes; file a claim for damage on account of the loss of berries? A. My partner did. Q. Who do you mean by your partner? A. Mr. Murphy. Q. Mr. Graupman, I show you Exhibit 1, and I ask you whether or not that is the claim filed by the B. Presley Company with the Chicago, Milwaukee & St. Paul Railway Company? A. I think it is; I didn't make it; it is the first time I ever saw it. Q. Do you recognize the handwriting? A. No. Q. That is your regular claim blank? A. Yes. Q. And as far as you know this was made in the regular course of your business and filed with the railroad company? A. Yes, sir."

Manifestly this is not sufficient to sustain a finding that no claim was filed against the appellant, the Illinois Central Railroad Company, within the required time.

The order appealed from is affirmed.

CLARA WILLIAMS v. E. L. GILBERT.[1]

January 17, 1913.

Nos. 17,868—(129).

Land contract — covenant to sell and convey.

A contract for the purchase of land construed, and *held*, that a covenant by the vendor to sell and convey upon payment of the purchase price was implied.

Mutual and dependent covenants.

In such a contract, the covenant by the vendee to pay the purchase price on a day named, and the covenant of the vendor to convey, are mutual and

[1] Reported in 139 N. W. 502.

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dependent covenants, and the vendor is not entitled to a reasonable time in which to perfect title in himself after the day provided in the contract for the payment of purchase price.

Rescission of contract.

The vendee in such a contract is entitled, upon payment of the purchase price, to the deed of the vendor, and, if the latter has no title, is not obliged to accept a deed from a stranger to the contract, but may treat the contract as breached by the vendor, and rescind. Time is of the essence of such a contract.

Finding sustained by evidence.

A finding of the trial court that there was no oral agreement extending the time for the performance of the contract *held* sustained by the evidence.

Findings — admission of evidence.

There was no reversible error in the findings, or in the rulings on the admission of evidence.

Action in the district court for Hennepin county to recover $500, the amount of earnest money paid upon the land contract set out in the opinion. The facts are stated in the opinion. The answer denied that defendant represented to plaintiff that he was the owner of the land, that he executed the written agreement which is set out in the opinion, that plaintiff paid out the sum of $500 pursuant to the terms thereof, and denied the allegation in the complaint that defendant never has had any greater or different title in the land than by virtue of the contract to explore and purchase the same, and that defendant had never fulfilled his contract or exercised his option to purchase. The answer further alleged that it was agreed between defendant and plaintiff that the time for the payment of the sum of $3,500 by plaintiff should be extended until after January 20, 1911; and that plaintiff, knowing that defendant was relying upon such agreement in reference to the payment of the $3,500 and the conveyance of the premises, demanded an immediate conveyance of the land on January 20 or January 21, 1911, for the purpose of obtaining a repayment of the $500 demanded in the complaint. The reply specifically denied the making of the agreement set out in the answer. The case was tried before Dickinson, J., who made findings and ordered judgment in favor of plaintiff for the amount de-

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manded. From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Savage & Purdy, for appellant.

M. C. Bowler and *Brooks & Jamison*, for respondent.

BUNN, J.

This is an action to recover the sum of $500 paid by plaintiff to defendant as earnest money upon a land contract; the claim of plaintiff being that defendant failed to perform and that plaintiff thereupon rescinded the contract. The case was tried by the court without a jury, and a decision for plaintiff rendered. Defendant appeals from an order refusing a new trial.

The right of plaintiff to recover largely depends upon the construction and legal effect of the contract, which was as follows:

LANDS IN SMALL OR LARGE TRACTS IN MILLE LACS, MORRISON, AITKIN, CROW WING, PINE, AND ST. LOUIS COUNTIES, MINN., OR NORTH DAKOTA.

Application to Purchase
To
E. L. Gilbert,
of Minneapolis, Minn.

Dated August 25th, 1910.

The undersigned, being of lawful age and legally qualified to contract, hereby applies to purchase the undivided seven-sixteenth (7/16) interest in the south half of the northwest quarter, and north half of the southwest quarter, section seven, township forty-six, range twenty-nine, in Crow Wing county, State of Minnesota; containing ..... acres at the price of $..... per acre; total consideration, $4,000. I send herewith, as binding money, $500.00, and agree to pay on the 20th day of January, 1911, the balance of $3,500.00.

This is to be a binding contract of sale of said premises under the above terms and conditions, subject to the approval of one of the parties above named at Minneapolis, Minn. * * * In case I fail to pay the said $3,500.00 when due, then this preliminary agree-

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ment shall become null and void at the option of said * * * E. L. Gilbert, and I agree to forfeit said binding money as liquidated damages.

Dated August 25, 1910.

[Applicant's signature] Clara Williams.

Below the signature of the purchaser were these words:

Approved this 25th day of Aug., 1910, by E. L. Gilbert.

This contract, aside from the signatures of the parties, was wholly prepared by defendant upon a blank printed form. Plaintiff paid the $500 binding money on the day the contract was signed. On January 20, 1911, plaintiff was ready and willing to perform her part of the contract, and sought to tender to defendant the balance of the purchase price, but defendant was not to be found. On the 21st the tender was made, and a conveyance demanded. Defendant did not and could not convey, as he had no title to the land, except an option to purchase from the owner, one Jacobson. Plaintiff thereupon elected to rescind, and served upon defendant notice of her election, and demanded the return of the $500 paid as earnest money, which demand defendant refused.

1. Defendant's first contention is that by the contract he did not agree to convey the land. We think it clear that there was an implied agreement by defendant to convey to plaintiff upon payment of the purchase price. If this is not defendant's promise, what consideration is there to support the payment by plaintiff of the earnest money, or her agreement to pay the balance of the purchase money? What was defendant to do, if not to convey the land? Such a construction would hardly help the defense of this action, which is not for specific performance, but only to recover the earnest money paid. However, it seems plain enough, construing the contract as a whole, that plaintiff was the purchaser, and defendant the vendor, and that the latter by implication agreed to sell and convey the land upon performance by plaintiff of her part of the contract. An agreement to sell implies an agreement to convey. There can be no buyer without a seller. Defendant, at the head of the blank form on which the "Ap-

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plication to Purchase" was made, advertised "Lands in Small or Large Tracts." Plaintiff applies to defendant to "purchase" land described. The writing declares: "This is to be a binding *contract of sale.*" Defendant's contention amounts to the claim that the contract was binding upon plaintiff, but not on defendant, a contention which we do not sustain.

2. It is urged that defendant was entitled to a reasonable time, after the tender of the purchase money on the day provided by the contract, not only to make conveyance of the land, but to procure title in himself. In other words, plaintiff was obliged to pay the purchase price on the day named, or she forfeited the earnest money, but defendant need not then convey the land. What had plaintiff in return for the money she had parted with? An agreement to convey in the future, when and if defendant procures a title to convey. Such a construction, as said in Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362, "is harsh, unfair, and unnecessary." Clearly the covenant by plaintiff to pay the purchase price, and the covenant of defendant to convey, are mutual and dependent. The payment was to be made when the sale was consummated by a proper conveyance, and the conveyance was to be made when the money was paid or legally tendered, on the day provided by the contract. Snow v. Johnson, 1 Minn. 32 (48); Goss v. Broom, 31 Minn. 484, 18 N. W. 290; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. ed. 219. The cases relied upon by defendant are not in point.

3. There is no merit in the point that plaintiff was not entitled to insist upon a deed from defendant, and that a deed from Jacobson, the owner of the title, was all that she had a right to demand. Defendant was the vendor in the contract, and plaintiff was entitled to his deed. She was entitled to insist upon a good title in defendant, and a deed from him. George v. Conhaim, 38 Minn. 338, 37 N. W. 791. And time was of the essence of the contract.

Defendant argues that plaintiff is seeking to enforce a very drastic remedy, without reference to the equities of the case, and that as defendant tendered a good title three days after the time specified for performance, and is not seeking relief against the plaintiff, it is inequitable to compel him to return the earnest money. But this

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is a case to be determined from the strict legal rights of the parties. It does not occur to us, however, that the remedy sought is a drastic one. Plaintiff is not seeking to enforce a forfeiture. Defendant is. Defendant was not entitled to a reasonable time to make good his title, and the fact that he subsequently acquired a title does not avoid the effect of his breach of contract. Gregory v. Christian, 42 Minn. 304, 44 N. W. 202, 18 Am. St. 507. Defendant was unable to convey a good title, and was clearly guilty of a breach of contract that gave plaintiff the right to rescind, which she exercised. It is unnecessary to consider whether Jacobson had a marketable title.

4. Defendant alleged, and offered testimony to prove, that there was an oral agreement extending the time for performance of the contract. The trial court found against defendant on this issue. An examination of the evidence satisfies us that it sustains the decision on this point. Nor can we sustain the point that plaintiff waived performance at the time specified by any act or declarations that manifested an intent to waive, or that served to mislead defendant into the belief that he was to have additional time in which to secure and convey a good title.

5. We discover no ground for reversal in the various assignments of error that relate to findings that are claimed to be without support in the evidence, or in the rulings of the trial court on the admission of evidence.

Order affirmed.

BETSY COREY v. CLARK G. COREY.[1]

January 17, 1913.

Nos. 17,870—(130).

Removal of executor — personal interest against estate.

Upon a petition by a widow, who had renounced her husband's will, to remove the executor named by the will, on the ground of his personal in-

[1] Reported in 139 N. W. 509.

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terest in certain transfers made by the testator in his lifetime and alleged by the petitioner to be invalid, *held*, under the facts, that the establishment of the invalidity of such transfers was not essential to the granting of the relief sought.

Same — right to impartial representative.

The fact that the petitioner was the only person who would be benefited by a restoration of the property so transferred *held* not to bar her right to have the matter passed upon by an impartial representative in the first instance, and to have such a person in charge of the estate so long as such matter is in controversy.

Betsy Corey, widow of H. A. Corey, deceased, petitioned the probate court for Winona county that it would require Clark G. Corey to show cause why he should not be removed as executor of the last will and testament of H. A. Corey, deceased. The petition was denied by the probate court, and an appeal from the order refusing to remove the executor was taken by petitioner to the district court for that county. The matter was heard before Snow, J., who made findings and ordered judgment affirming the order of the probate court. From the judgment entered pursuant to the order, Betsy Corey appealed. Reversed, with direction to the district court to enter judgment in accordance with the opinion.

Brown, Abbott & Somsen, for appellant.

Webber & Lees, for respondent.

Philip E. Brown, J.

Application under R. L. 1905, § 3709, to remove an executor for unsuitableness and for failure to file an inventory. The probate and district courts denied relief, and from the judgment of the latter declaring such determination the petitioner appealed.

The following are the facts:

H. A. Corey and the petitioner intermarried in 1885, and lived together as husband and wife until his death, which occurred in 1911. He died testate, leaving as his heirs his widow, four children, all of whom are the petitioner's stepchildren and all are nonresidents of this state, except Clark G. Corey, and also two grandchildren.

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The will was probated in Winona county, and the court appointed the son Clark executor. He has so conducted the affairs of the estate that distribution might be made, were it not for the disposition by the deceased in his lifetime of a portion of his property under a trust deed and certain donations, to both of which transactions we will next refer, and also the pendency of this application. The widow elected not to take under the will. On April 22, 1905, Mr. Corey and one Wold executed an instrument whereby, for the stated consideration of one dollar and trust and confidence reposed, the former attempted to assign, grant, bargain, and convey unto the latter and his successors in trust choses in action and loans amounting to $22,600, including notes aggregating $2,000 executed to him by his son Clark, in trust for the following uses and purposes, and none other:

1. To take possession of the choses in action and loans, and to collect the principal and interest thereon, and annually pay the interest to the deceased and to reinvest the principal in real estate securities.

2. Upon the death of H. A. Corey, or within such reasonable time thereafter as might be, consideration being given to the condition of the loans, to pay the principal sum, together with any interest that might then have accumulated thereon, or, in the event that the principal and interest should not be due, then to assign the principal sums and accrued interest to his four children, less expenses remaining unpaid, in the following proportions: To Clark G. Corey, $5,100, and to each of the other children of the decedent $4,500; provided, however, that should Betsy Corey, the decedent's wife, not survive him, then the $4,000 payable to her conditionally in the "Oliver contract and notes" [which were included in the trust instrument] should be paid to the children in equal parts.

3. As to certain notes and mortgages given by the son Clark G. Corey, also included in the trust agreement, the trustee, or his successor, was directed to renew the same from time to time as they matured, and payment to Clark of the amount assigned by the present instrument for his benefit was to be made by indorsement on his

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notes and mortgages aforesaid, satisfying the same to that extent of record.

4. In the event of the death of any of the children, leaving them surviving living issue, the sum payable to them under the trust was to be paid to such issue; but in the event of any of the children dying without leaving surviving living issue, then the sum directed to be paid to such child was to be distributed equally among the survivors of the other children.

5. Upon the death of H. A. Corey, all expenses incident to the trust, then remaining unpaid, were first to be deducted, and the balance of the estate was to be paid to the children pro rata as directed in the trust agreement.

The trustee accepted the trust and promised and agreed to carry out the provisions thereof faithfully and to the best of his ability.

Wold received from Mr. Corey the choses in action and loans mentioned in the trust instrument, managed the same during the remainder of Corey's life, paid over to him while he lived the net income therefrom, and after his death paid over the principal, with accrued interest, to the ultimate beneficiaries named in the trust instrument in the prescribed proportions or amounts. The property so distributed is still retained by the respective recipients thereof; and the executor refuses to inventory the portion received by him, or to account therefor as a part of the estate of the deceased, or to take, for the benefit of the estate or any person interested therein, any steps or proceedings, at law or otherwise, to recover from any of the beneficiaries and recipients any part of the property transferred to them under the instrument.

It appears, furthermore, that in December, 1910, and January, 1911, Corey transferred and assigned directly to the same children, including C. G. Corey, the executor, notes, mortgages, and other securities amounting to the sum of over $5,000, and surrendered up to him and canceled, without consideration, certain promissory notes to the amount of $1,400, which he had theretofore, upon good consideration, executed to the father.

It does not appear that any of the decedent's heirs, excepting the

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petitioner, either demands or desires any action to be taken to obtain restoration to the estate of any of the property transferred as above mentioned. There are no creditors whose claims require such restoration, nor is the same necessary for the payment of the expenses of administration or for the payment of any legacy bequeathed by the will; and the petitioner's application is made purely in her own interest, and not for the general benefit of the estate, for the purpose of increasing the share of the estate which may come to her by reason of her renunciation of the will, and her demand for the removal of the present executor is to subserve that purpose, and, if granted, will effect no benefit to any other person interested in the estate.

The foregoing constitutes the substance of the court's findings of fact, which are unchallenged. In addition thereto, it appeared that the estate of the deceased inventories, including the widow's allowances, less than $10,000.

The district court denied the application of the petitioner on the sole ground that she had the right to institute and prosecute an action in her own name to test the validity of the trust and donations, and for the reason that, as such action, if successful, would redound to her advantage alone, it was but fair and equitable that she individually should meet and defray the necessary expenses thereof. The court was of the opinion, however, as indicated by its memorandum, that if the petitioner was entitled to have an action brought by a representative of the estate to test the validity of the trust and the gifts in question, then this executor would be an unsuitable plaintiff to prosecute an action either against himself or his brothers or sisters. Counsel for the respondent frankly so conceded on the oral argument, and to this we agree.

1. The respondent contends that the trust agreement and the donations assailed by the petitioner were both valid and unassailable in this proceeding or any other, and that in any event no showing was made below of their invalidity. The lower court was of the opinion that such questions were not material in this proceeding, and neither was adjudicated below. But the question nevertheless arises, where an action must be brought or alleged rights abandoned, as to what

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showing one interested in an estate must make of the existence of a cause of action in favor of the estate in order to warrant a holding that a representative is unsuitable to retain his position as such, when it appears, as it does in this case, that, if a right of action does exist, then that there is such antagonism of interest on the part of the administrator as to disqualify him to act in the premises. This question is so intermingled with the general question of suitableness that we will cite some of the authorities covering both questions which, we think, state true views.

In Putney v. Fletcher, 148 Mass. 247, 19 N. E. 370, it was declared that an executor or administrator is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his duty, and that where the estate has been represented to be insolvent, and there is reasonable ground to believe that a conveyance of land made by the deceased was fraudulent, creditors have the right to insist that the representative of the estate try the question. In the case of In re Estate of Mills, 22 Or. 210, 29 Pac. 443, which involved the removal of an administrator, the court said:

"It is apparent, from the mere statement of the claims of the petitioner and the administrator, that there is a direct conflict of interest between the estate and" the administrator, "and that he cannot act indifferently in the matter. An administrator stands in the position, so to speak, of a trustee, and should be a person who can and will carefully guard the interests of the estate, and at least stand indifferent between it and claimants to the property. This" the administrator "cannot do; and he must necessarily, if allowed to act as administrator, sacrifice the interests of the estate, if any, in this property, or his own interests, and it is expecting too much of human nature to assume the latter."

In that case the administrator claimed to have purchased certain lands, while the petitioner claimed that no such purchase had been made, and the court further said:

"We do not concede this to be a proper proceeding in which to try the question of the title to this property, and therefore do not express

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or indicate any opinion thereon; nor as a fact have we examined the testimony further than to see that there is a real and substantial controversy, and one which must be tried in the proper forum, the estate being represented by some person as administrator who is in a position to assert its rights, if any. It is sufficient for us to know that the interests of" the administrator "as an individual and as administrator are so antagonistic that they cannot be represented by the same person."

See, also, in this connection, Marks v. Coats, 37 Or. 609, 62 Pac. 488; In re Wallace, 68 App. Div. 649, 74 N. Y. Supp. 33.

We think it clear that one interested in an estate has the right to have its representative wholly free from conflicting personal interests, so that, when the question arises as to the necessity or propriety of a judicial investigation concerning the existence of uninventoried assets, such question may be determined in the first instance by one entirely free from adverse interests or partiality. Moreover, at least where, as is the case here, no suggestion is made of the assertion of a sham claim in favor of the estate, it is necessary for the petitioner to establish only what has been done, namely, that there is a real and substantial controversy. To hold that the petitioner must establish the claim which he seeks to have enforced by the representative would make his rights depend, not upon the fact of their existence, but upon his ability to establish them in a collateral proceeding. The futility of such a rule is apparent, when we consider that the determination so made would not establish a personal liability on the part of any one, and would adjudicate no property right, but merely constitute a finding of facts as a foundation for the removal of the representative. It would compel the petitioner to expose his entire case to his adversary in a matter essentially preliminary. In the instant case we think the lower court was right in declaring that the question of the actual validity of the claims asserted by the petitioner was not properly determinable in this proceeding.

We do not mean, however, that the court should remove an executor upon slight or flimsy grounds, for he is the choice of the deceased to execute the will and to be its champion; but he must be the unbiased

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representative of all persons interested in the estate, and remain neutral between them, and while no rule of universal applicability can safely be formulated to govern removals, it being necessary that each case should rest upon its own facts, yet in the instant case we think it clear that the interest of the executor in the subject-matter of the claims asserted by the petitioner is such that it would be wholly improper, in fairness to him, as well as to the petitioner, to require or permit him to pass upon the propriety of taking any steps concerning the petitioner's demand for the enforcement of the claims which she asserts.

An illustrative incident indicative of the correctness of this conclusion appears in the record. Subsequently to the appeal from the probate court to the district court, the executor made application for partial distribution; and when it is remembered that three of the beneficiaries of the trust which she attacks are nonresidents, and that the executor testified that they had no property in this state so far as he knew, outside of their interest in the estate, the action of the executor in seeking distribution is significant, though, indeed, it may accord with an honest intent.

2. The respondent, however, contends that, even if the petitioner's attack upon the transfers here involved be well grounded, yet that, since she is the only person who will be benefited by a restoration, her claims are not such as should be litigated by the estate, with the incidents of liability for costs, etc., but that they should be prosecuted by the petitioner in her own name and at her own expense, and that therefore the unsuitableness of the respondent to pass upon or prosecute them is entirely immaterial. But in First Nat. Bank of Boston v. Towle, 118 Minn. 514, 137 N. W. 291, a similiar contention made by the executor met with disapproval, and we have been cited to, and have ourselves found, no authority supporting the respondent's position. McCord v. Knowlton, 79 Minn. 299, 82 N. W. 589, held merely that the remedy given to the executor or administrator by what is, substantially, now R. L. 1905, § 3720, was cumulative, and did not deprive a creditor of the right himself to pursue the property sought to be subjected to his claim, and the other cases cited by the respond-

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ent in this connection are to the same effect, all, moreover, involving the claims of creditors.

These cases, if in point at all in the instant case, tend merely to establish the right of the petitioner to enforce the claims asserted by her in her own name and behalf, which for the purposes of this case we may concede; and, aside from the fact that she is a beneficiary, and not a creditor, her petition here involves something more than the question as to who will or shall be compelled to bring the suit, if one is to be brought, for, as we have already stated, she has the right to have the propriety of the institution of an action passed upon by an unbiased representative in the first instance.

Moreover, we are averse to holding that a person shall be deprived of a remedy because perchance, a different one may also exist. The serious difficulty of reaching just results under the administration of the common law was not so much because of the imperfection of its remedies, as its paucity of remedies, which latter defect gave rise to the establishment of equity jurisprudence, with its remedial elasticity. We have no disposition to turn the clock backward. The denial of a remedy, because it is claimed another and more appropriate one exists, frequently results in the deprivation of a right. Can we hold with the respondent's contention, and be just to the petitioner? Is it fair to her that this executor should be left in charge of the estate and in possession of the papers of the deceased, while she personally conducts litigation against the preferred heirs? Must she combat the executor individually and also as executor? Will he be impartial as executor while such litigation is going on? Is a representative of the estate of a decedent to be allowed to meet a charge of failure to perform his statutory duties preferred by an heir, by an assertion that the heir has some other remedy?

It appears that the executor has already attempted, since this litigation was commenced, to have partial distribution. We have already adverted to this in the first subdivision of this opinion, but it is also of prime significance here. Two of the preferred heirs reside in Oregon, and one in Colorado. None of them has property in this state, so far as the executor knows, except their interest in the estate. It may be that the only chance the petitioner has ultimately to obtain relief against these absentees is by way of impounding their interest in the

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estate. Neither are we disposed to compel the petitioner to seek the enforcement of her alleged rights against these heirs at their domicil. It should be an exceptional case, indeed, where a widow, under circumstances similar to those here disclosed, will be compelled to seek at her own expense the recovery of that which the law gives as her share of the estate, when under our laws the duty of reducing the assets to possession devolves upon the representative, and it is contemplated that the widow shall receive her portion without affirmative action on her part.

The suggestion, found in the memorandum of the district court, that if the respondent were to be removed and some other person appointed in his place, the latter "might prove refractory likewise," is not here in point. The possibility referred to is too remote to have weight, and, furthermore, cannot affect the petitioner's right to demand that the proper attempt should be made to obtain an impartial representative. We might also add that, if necessary, the probate court would have power to compel action in the event that the unwillingness of the substituted representative were not deemed such as to require his removal also.

Judgment reversed, with direction to the district court to proceed to enter judgment in harmony with the views herein expressed.

BOYD T. WILLIAMS v. MINNESOTA STATE BOARD OF MEDICAL EXAMINERS.[1]

January 17, 1913.

Nos. 17,876—(159).

Appealable order.

The action of the State Board of Medical Examiners in refusing to grant a license to a physician from another state, applied for under Laws 1905, c. 236, is not appealable.

[1] Reported in 139 N. W. 500.

Note.—The decisions on the review of the action of a medical board are gathered in a note in 20 L.R.A. 355.

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Boyd Thompson Williams appealed to the district court for Ramsey county from the action of the Minnesota State Board of Medical Examiners denying appellant a license to practice medicine and surgery in the state of Minnesota "upon questions of law and fact, as provided by section 2296 of the Revised Laws 1905," as amended by Laws 1909, c. 474. The board made return of proceedings had before it, and the respondent moved the court to make an order requiring appellant to make and serve a complaint in the matter of the appeal, setting forth his cause of action and ground of appeal, with leave to respondents to move to dismiss the appeal for want of jurisdiction of the court or to demur to or answer the complaint as advised. The appellant filed his complaint and the respondents moved to dismiss the appeal on the ground that the court had no jurisdiction of the subject-matter of the action. From an order, Olin B. Lewis, J., dismissing the appeal on the ground that the court was without jurisdiction, appellant appealed to this court. Affirmed.

W. R. Duxbury, for appellant.

Lyndon A. Smith, Attorney General, and *Clifford L. Hillman,* Assistant Attorney General, for respondents.

Philip E. Brown, J.

Is the action of the State Board of Medical Examiners in refusing, upon any ground whatsoever, to grant a license to a physician licensed in another state, and who makes application for a license in this state, under the so-called "reciprocity act," being Laws 1905, p. 370, c. 236,[1] reviewable by appeal to the district court? The court below answered this question in the negative, and ordered the appeal dismissed, and the sole question here involved is the correctness of this ruling.

We gather from the state's brief that Laws 1883, p. 167, c. 125, was the first act on the subject of licensing physicians. It provided, in substance, that any one practising for five years in the state at the time of its passage was not subject to its provisions, and holders of medical diplomas were declared to be entitled to a certificate, but all others were required to take an examination. The license fee was $5,

[1] [R. L. Supp. 1909, §§ 2297-1, 2297-2].

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and an appeal was allowed to the body appointing the board of examiners. No reference was made to physicians from other states. This act was expressly repealed by Laws 1887, p. 46, c. 9, providing for a board of medical examiners appointable by the Governor. No physician could be licensed under this act without an examination upon certain subjects specified, the fee was $10, and an appeal was allowed to the appointing power; but physicians from other states participating in actual consultations were exempted from the operation of the act. Laws 1895, p. 209, c. 89, amended this act, and provided that persons who had been in continuous practice in the state since June 1, 1887, might be licensed upon submitting a diploma from a recognized college of medicine or by undergoing an examination; but all persons commencing to practice after January 1, 1889, were required to submit to an examination and to submit evidence of their attendance at a medical college. The examination fee was $10, and an appeal was allowed as in the former acts.

This act was repealed by R. L. 1905, § 5541, but the subject-matter thereof was covered by section 2296, providing that persons not already authorized to practice medicine in the state and so desiring shall apply to the secretary of the board of examiners and pay a fee of $10, which in no event shall be refunded; that the applicant must prove that he has completed four entire sessions of 26 weeks each at a recognized medical college; that he shall be examined in certain enumerated branches of medical learning, and such others as the board shall deem advisable; that, if seven members of the board consent, license shall be granted, the examination, however, to be both scientific and practical, thoroughly testing the fitness of the candidate; and, finally, that "the board may refuse to grant a license to, or may revoke the license of, any person guilty of immoral, dishonorable, or unprofessional conduct, but subject to the right of the applicant to appeal to the Governor." This act does not refer in any way to physicians from other states; this subject, however, being covered by section 2297 of the revision as follows: "The board, either with or without examination, upon receipt of a fee of $10, may grant a license to any physician licensed to practice by the similar board of another state."

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But this provision never went into effect, because of section 5504 exempting the Laws of 1905 from the revision, and of Laws 1905, p. 370, c. 236, which is a comprehensive statute, covering the subject of permission to foreign physicians to practice in this state. It is this act of 1905 under which the applicant in the instant case applied for and was denied a license. It is as follows:

An act authorizing physicians from other states to practice medicine in Minnesota.

SECTION 1. That the state medical examining board, either with or without examination, may grant and [a] license to any physician licensed to practice by a similar board of another state, and who holds a certificate of registration showing that an examination has been made by the proper board of any state in which an average grade of not less than seventy-five (75) per cent was awarded the holder thereof, the said applicant and holder of such certificate having been at the time of said examination the legal possessor of a diploma from a medical college in good standing in this state, which said diploma may be accepted in lieu of an examination as evidence of qualification. In case the scope of said examination was less than that prescribed by this state the applicant may be required to submit to an examination in such subjects as have not been covered. The fee for such examination shall be fifty ($50) dollars.

A certificate of registration or license issued by the proper board of any state may be accepted as evidence of qualification for registration in this state; Provided, the holder thereof was at the time of such registration the legal possessor of a diploma issued by a medical college in good standing in this state and that the date thereof was prior to the legal requirements of the examination test in this state.

SEC. 2. If by the laws of any state or the rulings or decisions of the appropriate officers on boards thereof, any burden, obligation, requirement, disqualification or disability is put upon physicians registered in this state or holding diplomas from medical colleges in this state which are in good standing therein, affecting the right of said physicians to be registered or admitted to practice in said state, then the same or like burdens, obligations, requirements, disqualifications

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or disability shall be put upon the registration in this state of physicians registered in said state or holding diplomas from medical colleges situated therein.

A general repealing clause followed.

This act has never been changed. Nor has the general act, R. L. 1905, § 2296, referred to above, except that Laws 1909, p. 590, c. 474,[1] makes the appeal provided for thereby lie to the district court, instead of the Governor.

From this review of the statutes, we think it is apparent that the legislature in recent years have had in mind two methods of admission to practice medicine in the state, namely: (1) By examination; and (2) in the case of foreign physicians, with or without examination, in the discretion of the board—the former provision for admission on diploma having expired January 1, 1899, by express limitation fixed by Laws 1895, p. 209, c. 89. Furthermore, it appears that R. L. 1905, § 2296, applies to all persons, whether residents or otherwise, not authorized to practice in the state, who desire such admission upon examination and the payment of a fee of $10; examination not only being a condition precedent, but the predominant feature of the act.

On the other hand, the reciprocity act contemplates a wholly different procedure. It is plainly a limited statutory application of the doctrine of comity, and is, on this account and by the express provisions of the act, essentially different from the provisions conferring the absolute right to admission to practice medicine upon the specified conditions as to examinations, etc. The board is authorized to admit a foreign physician, either with or without examination, which, of necessity, vests the board with a certain discretion, and if they see fit to require an examination the fee therefor is $50; the statute in both of these particulars being widely variant from the general act.

Furthermore, the two methods of admission referred to have always been made the subject of separate and distinct enactments. The reciprocity act contains no provision concerning appeals, and while we may not, perhaps, be required to search for a reason for this omis-

[1] [R. L. Supp. 1909, § 2296].

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sion, it might be attributed to the reciprocal nature of the act, in which connection it may be suggested that it does not appear that appeals are allowed in such cases in other states. Reciprocity and comity import the granting of a favor, which conception of itself would seem to negative the right to complain of its denial, except where such right is clearly given.

The right of appeal is purely statutory. McMillan Co. v. State Board of Health, 110 Minn. 145, 150, 124 N. W. 828. The reciprocity act, as stated, contains no provision for appeal; but the appellant seeks to find such by reading into this statute the provisions of the last paragraph of Laws 1909, p. 590, c. 474, giving the right of appeal, and urges that any other construction would be forced and narrow, and contrary to the rule stated in Minneapolis, St. P. & S. Ste. Ry. Co. v. Pierce, 103 Minn. 504, 508, 115 N. W. 649, and State v. Larson, 83 Minn. 124, 86 N. W. 3, 54 L.R.A. 487; that in seeking the meaning of a statute the result following a particular construction should be considered, as well as the presumption that the legislature did not intend to create an absurd or unjust condition. The applicability of this rule is granted; but we think it by no means follows that we must sustain the appellant's contention. To do this we would have to ignore the distinction, already noted, between the act under which the appellant claims admission and section 2296, and likewise the reciprocity features of the former, and also would have to assume that the legislature, by the act of 1909, *which purports to amend only section 2296,* intended to confer the right to appeal upon persons not otherwise within its provisions, and whose sole claims in the premises are based upon another and distinct act. Watkins v. Bigelow, 93 Minn. 210, 222, 100 N. W. 1104; Megins v. Duluth, 97 Minn. 23, 26, 106 N. W. 89; Hjelm v. Patterson, 105 Minn. 256, 117 N. W. 610, 127 Am. St. 560.

We hold that the action of the board in refusing a license applied for under Laws 1905, p. 370, c. 236, as amended, is not appealable. In reaching this conclusion we have not overlooked the suggestion that the result reached would necessarily involve a holding that the board would be powerless to revoke a license granted under the reciprocity act. While such question is a proper one to be considered in deter-

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mining the legislative intent here involved, its determination in accordance with the appellant's suggestion should not affect our conclusion upon the question before us; nor do we pass upon it. We will say, however, that we think that such result does not necessarily follow; but, as there may be some doubt about this, we think that it is a matter which should be given legislative attention.

Order affirmed.

JOHN A. HEDLUND v. MINNEAPOLIS STREET RAILWAY COMPANY.[1]

January 17, 1913.

Nos. 17,891—(178).

Collision with street car — res gestæ — questions for jury.

In this action to recover for personal injuries received in a collision between an automobile and a street car at a crossing, it is *held:*

1. That the questions of defendant's negligence, contributory negligence, and wilful negligence were for the jury, and the evidence sustains the verdict.

2. A certain declaration of the motorman, made immediately as the car stopped after the accident, *held* to be a spontaneous declaration, part of the transaction, and tending to explain and characterize the accident, and therefore admissible under the so-called "res gestæ" rule. It was also admissible as impeaching evidence.

3. There was no reversible error in the rulings on the admission of evidence, or in the instructions to the jury.

Action in the district court for Hennepin county to recover $26,500 for personal injury. The complaint alleged that, while in the act of driving his automobile in a prudent and careful manner over the

[1] Reported in 139 N. W. 603.

Note.—On the question of the care required of driver of automobile at railroad crossings, see notes in 21 L.R.A.(N.S.) 794 and 29 L.R.A.(N.S.) 924.

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street car tracks and while lawfully upon the street crossing, defendant negligently and wantonly, with full knowledge of the fact that plaintiff was upon the street, crossing its tracks, as he had a right to do, ran one of its electric cars at a very high and dangerous rate of speed, to-wit, 40 miles an hour, over said crossing and into plaintiff's automobile; that by and through the motoneer in charge of the car defendant had full knowledge and notice of the fact that plaintiff was crossing its tracks, and had full knowledge and notice of the perilous position in which plaintiff was placed by reason of such operation of its car, but wholly failed to make any effort to avoid the collision. The answer, while admitting the collision, amounted to a general denial and alleged that whatever injuries plaintiff received were due to his negligence. The case was tried before Hale, J., and a jury which returned a verdict in favor of plaintiff for $6,513.88. From an order denying its motion for judgment in its favor notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

John F. Dahl, W. O. Stout and *N. M. Thygeson,* for appellant.

Ludvig Arctander and *John A. Nordin,* for respondent.

BUNN, J.

This action was brought to recover damages for personal injuries received by plaintiff in a collision between an automobile driven by him and one of defendant's street cars, at the intersection of Twenty-Second street and Chicago avenue, Minneapolis. Plaintiff recovered a verdict of $6,513.88. Defendant appeals from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The facts necessary to an understanding of the questions involved here are as follows:

Chicago avenue runs north and south, and is crossed by Twenty-Second street at right angles and on the level. Defendant operates a double-track line on Chicago avenue. The crossing is in a thickly settled mixed residence and business portion of the city. Plaintiff, who was in the automobile business, was at about 10 o'clock on the night of the accident driving his car on Twenty-Second street, on the

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way to his garage. As he approached Chicago avenue, at some points his vision to the south was obstructed by buildings. He saw no car approaching from that direction, but did see a south-bound car stop and discharge passengers at the crossing. He kept on at about the same rate of speed he had been going, 8 miles an hour, and when he reached the sidewalk crossing discovered a street car approaching from the south and some 500 feet away. Plaintiff testified that he then slowed his speed to three miles an hour, moved to the westerly or south-bound track, looked around the car, which was "standing there or probably moving," and discovered the north-bound car some 125 or 150 feet away. The front of the automobile was then on the easterly track, and plaintiff attempted to increase his speed and get over the track, but was unable to do so, perhaps because of the condition of the crossing. He tried to give the motorman on the car warning by sounding his horn, and "that is the last I remember of it until I woke up in the hospital." The car struck the automobile with great force, and demolished it. Plaintiff was seriously injured.

The complaint charged negligence in running the street car at a high and dangerous rate of speed, in approaching the crossing without having the car under control, and wilful negligence. The answer denied negligence on the part of defendant, and alleged contributory negligence. The trial court denied a motion for a directed verdict, and submitted the case to the jury on the issues of defendant's negligence, contributory negligence of plaintiff, and wilful negligence. The assignments of error raise the usual questions of the sufficiency of the evidence to warrant the submission to the jury of these issues, and to sustain the verdict, and also questions as to the admission of evidence and as to instructions of the court to the jury.

1. On the question of defendant's negligence, it is sufficient to say that in our opinion the evidence was amply sufficient to take the case to the jury and to justify the verdict.

We reach the same conclusion as to the issue of contributory negligence. It would serve no good purpose to analyze the very voluminous evidence on the various points that are claimed to show want of care on plaintiff's part. We have considered the record with care,

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and on the whole case are unable to hold that it was conclusively shown that plaintiff could have avoided the accident by the use of ordinary care, or that the verdict is not fairly sustained by the evidence on this issue.

The trial court submitted the question of "wilful" negligence to the jury. The correctness of the instruction is not questioned, and could not well be. Defendant's claim is that there was no evidence on which to base the instruction, or a finding that the motorman was guilty of negligence after he discovered plaintiff in a position of peril. The only doubt here is as to whether there was any evidence reasonably tending to show that the motorman discovered the presence of the automobile on the track, and the apparent inability of plaintiff to escape a collision, in time to have stopped the car or slackened its speed, so as to avoid the accident. The evidence did not make a strong showing; but we hold that it was sufficient to justify the instruction, and to prevent our saying that the verdict has no reasonable support on this point.

2. Much of defendant's brief and argument in this court is devoted to an alleged error in receiving on rebuttal the testimony of witnesses as to an exclamation of the motorman, made immediately as the car came to a stop after the collision. He opened the door of the car vestibule and said to the bystanders, "That —— —— —— ran into me, and I rang the bell for him." The words omitted were profane and insulting to plaintiff and a parent. The motorman had testified on his direct examination that he did not see the automobile until his car was within about 20 feet of the point of collision, that he then turned on the reverse, and, that failing, applied the air brake. In short, his direct examination tended to show that he exercised due care after discovering the peril of plaintiff, and that he acted calmly, deliberately, and with good judgment in the emergency that confronted him. He was asked on cross-examination whether he made the exclamation or remarks quoted, and denied it. If the exclamation was admissible as part of the res gestæ, or if it was proper impeachment, it was not error to receive it.

The exclamation was clearly closely enough related to the accident in point of time to be a part of the transaction, and was suffi-

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ciently spontaneous; and, if it had any fair tendency to explain or characterize the accident, it was admissible as "res gestæ." The question of the admissibility of the evidence as impeachment in its final analysis comes to the same point. A proper foundation had been laid, and, if the statement of the motorman was relevant to any issue in the case, it was properly received. On the other hand, if the exclamation had no tendency to explain or characterize the accident, it was inadmissible under the so-called "res gestæ" rule; and if it was irrelevant to any issue in the case, it should have been excluded as impeaching testimony, and its reception would be error.

We think the evidence was properly received. It had a tendency to show that the motorman was not only excited, but immediately charged plaintiff with running into the car, a charge that no evidence supported. It served to indicate a desire to throw the entire blame for the accident upon plaintiff, and to clear the motorman. Not unlike evidence that a person accused of crime has attempted to accuse others of its commission, the statement has a bearing and is relevant on the question of the speaker's guilt. In addition to this, the violent and unjustifiably profane and indecent nature of the remark tended to show that the motorman was not in the calm state of mind that his testimony was apparently intended to show he was in when he discovered the emergency that existed. It seems to us that the exclamation was a part of the transaction, and tended to illustrate, characterize, and explain it. It was a spontaneous declaration, a verbal act, and not a narration of a past event. The authorities are so very numerous, and each case depends so much upon its particular facts, that we think it unnecessary to extend this opinion by a review of the decided cases.

The case of Reem v. St. Paul City Ry. Co. 77 Minn. 503, 80 N. W. 638, 778, is clearly distinguishable. There the negligence consisted in stopping the car for passengers until it was so crowded that plaintiff was pushed off the front platform, on which he was riding. A woman witness was permitted to testify that after the accident she yelled to the conductor to stop the car, but that he said: "Never mind, lady; never mind. Just give me your fare." It was held that this remark of the conductor had no bearing on the issues in the case, was

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no part of the transaction, and did not explain or elucidate or characterize it in any way. In answer to the claim of counsel for plaintiff in the Reem case that the conductor's declaration was admissible, because it indicated "confusion of mind and loss of control of himself or over his car," the court held that the language used showed rather clearly that the conductor was not at all confused or disturbed, and that he was cool and deliberate. It is very clear that the declaration in the Reem case had no tendency to explain anything about the cause of the accident, or to show the state of mind of the conductor, while the declaration of the motorman in the present case did, we think, bear upon the issue of his negligence, and thus tend to explain, elucidate, or characterize the transaction.

In regard to the statements of bystanders, made in reply to the motorman's declaration, they appear to be, as far as admitted, simply a denial of the statement that the gong was sounded. We think these statements were admissible as spontaneous declarations tending to throw light on the accident. In any event, they were not prejudicial.

The statement of the motorman was also properly received as impeaching evidence. The rule is elementary that, when a witness has denied making a statement, his answer concludes the cross-examiner, if the statement is on an irrelevant matter. But, as we have said in discussing the question of "res gestæ," we hold that the declaration tended to show the state of mind of the declarant, which was a material matter. It also tended to show bias, and for that reason was relevant.

3. The court instructed the jury, on the subject of damages, to consider to what extent plaintiff had recovered, and that, if he had not fully recovered, whether or not his present condition "is liable to be permanent, or more or less permanent." This instruction is assigned as error, because it fails to tell the jury that, before damages for permanent injury can be allowed, there must be a reasonable certainty that the injury is permanent. Not having, either before or after this instruction was given, asked for an instruction as to the degree of proof required to justify the award of permanent damages, or called the attention of the trial court to the omission to give the

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rule, defendant is in no position to claim reversible error in the instruction given.

Defendant complains that it was error to submit to the jury the question whether the bell was rung or the gong sounded, because the noise made by the car sufficiently apprised plaintiff of its approach. But the court carefully explained to the jury that whether the gong was sounded or bell rung was immaterial, if the car made sufficient noise to warn plaintiff of its approach, and we cannot say that the evidence was such that the court should have told the jury that they could not consider the matter of the bell or gong.

We are satisfied that the questions in this case were for the jury, that there was no reversible error in the admission of evidence or in the instructions, that there was a fair trial, and that the verdict for plaintiff is fairly sustained by the evidence. The result is that the order appealed from should be affirmed.

Order affirmed.

NETTIE JUSTER v. COURT OF HONOR.[1]

January 24, 1913.

Nos. 17,546—(145).

Jurisdiction of municipal court.

In an action in the municipal court of St. Paul, jurisdiction of the person cannot be acquired by service of the summons outside of Ramsey county.

Same.

Where the complaint, in an action on contract in the municipal court of St. Paul, claims $500, with interest, the court is without jurisdiction of the subject-matter.

Amendment of judgment.

Where judgment in such an action is entered for the amount so claimed, the court has no jurisdiction to cure the defect by allowing a deduction

[1] Reported in 139 N. W. 701.

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from the amount of the judgment so as to bring it within the jurisdictional limit.

Defendant appeared specially for the purpose of the motion only and moved the municipal court of St. Paul to vacate (1) the service of summons and complaint, (2) the return of service of the summons and complaint, and (3) judgment entered in favor of plaintiff for $547.25. The ground of the motion was that the court did not acquire jurisdiction in the action over the defendant. The motion was denied, Finehout, J. From the order denying the motion, defendant appealed. Reversed.

Spooner, Laybourn & Lucas and *William B. Risse,* for appellant.

A. J. Hertz, for respondent.

PHILIP E. BROWN, J.

The plaintiff attempted to bring an action against the defendant, a foreign insurance company, in the municipal court of St. Paul on December 16, 1911, by serving copies of the summons and complaint in Minneapolis on one asserted to be the defendant's general manager for this state. The complaint set out a cause of action on contract, based upon an insurance policy issued by the defendant to one Singer, and under which the plaintiff, as beneficiary, claimed the sum of $500, with interest thereon at 6 per cent. per annum from August 26, 1910. On December 30, 1911, judgment by default was entered against the defendant for $540, and also for $7.25 costs. The defendant thereafter appeared specially and moved to vacate the judgment on the ground that the court had no jurisdiction either of the person or the subject-matter, which motion was denied, and this is an appeal from the order.

1. Did the court acquire jurisdiction of the person by the service of the summons outside of Ramsey county, assuming, for the purposes of this case, that if the service had been made within such county it would have conferred jurisdiction?

Special Laws 1875, p. 25, c. 2, is the original act establishing a municipal court in St. Paul. This act provided that the court should have jurisdiction of civil actions where the amount in con-

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troversy did not exceed $200. The act was amended by Sp. Laws 1876, p. 290, c. 211, § 1, providing in effect that where the demand of the complaint exceeded $100, but not $200, the court should have concurrent jurisdiction with the court of common pleas of the county, and that summons in such action should be served as like process was by law authorized out of the common pleas court. In Gould v. Johnston, 24 Minn. 188, the court construed the provisions of the latter act, saying:

"Inasmuch as by the law creating the common pleas court its jurisdiction was 'equal and concurrent' with the district court, and, consequently, its summons could be served in any county of the state by the sheriff of such county, or even by a private person, and as it is beyond question that, by the amendment we have quoted, the legislature intended to conform the jurisdiction of the municipal court, in the actions mentioned in it, to that of the common pleas court, and to adopt for the former the mode of service and return of summons applicable to the latter, there is nothing in the point that the summons was served " outside of Ramsey county.

In Shatto v. Latham, 33 Minn. 36, 21 N. W. 838, the court, in defining the jurisdiction of the municipal court of Minneapolis, held that, notwithstanding that its organic act contained no express limitation confining its jurisdiction to Hennepin county, yet the act should not be construed to authorize the service of process out of such court outside of the county.

The legislature, by Sp. Laws 1889, p. 994, c. 351, passed a comprehensive act confirming and continuing the municipal court of St. Paul, whereby its jurisdiction was enlarged and its practice and procedure regulated, and all acts inconsistent therewith were repealed. This act provided that the jurisdiction of the court should be coextensive with the limits of Ramsey county, and, as to subject-matter, should include actions "arising on contract for the recovery of money only, if the sum claimed does not exceed five hundred ($500) dollars."

The plaintiff contends that the summons in the instant action

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was properly served in Minneapolis, and argues, in support of this proposition, that the Shatto case, supra, is not in point, as against his contention; and, further, that his claim is supported by the doctrine of the Gould case, supra. This contention cannot be sustained. The Shatto case establishes, at least, that without some authority to the contrary, either express or fairly implied, service of process from municipal courts must be made within the county; and as Sp. Laws 1889, p. 994, c. 351, is evidently intended to define the territorial jurisdiction of the St. Paul municipal court, and moreover, Sp. Laws 1876, p. 290, c. 211, § 1, above referred to, giving such court concurrent jurisdiction with the court of common pleas, was repealed by Sp. Laws 1881, p. 930, c. 378, the whole force of the plaintiff's argument, based on the Gould case, supra, is destroyed. We hold therefore that no jurisdiction of the person was acquired by the service of the summons in Minneapolis.

2. Did the sum claimed in the complaint exceed the court's statutory jurisdictional limit as to amount, thus preventing it from acquiring jurisdiction of the subject-matter? This question must be answered in the affirmative. The plaintiff's contention in this regard likewise rests upon a statute which, as we have noted above, has been repealed; and the further insistence that the amount of principal and interest claimed in the complaint does not exceed the jurisdictional limit specifically fixed by Sp. Laws 1889, p. 994, c. 351, is also untenable, this question having been so determined by Crawford v. Hurd Refrigerator Co. 57 Minn. 187, 58 N. W. 985, construing the Duluth municipal court act, which, so far as concerns the question before us, is identical with the act here under consideration. See, also, Duresen v. Blackmarr, 117 Minn. 206, 135 N. W. 530.

We have been cited to no statutes which militate against the conclusions which we have reached in this and in subdivision 1 of this opinion.

3. It appears that, subsequently to the making of the order appealed from, the court, upon the plaintiff's application, amended the default judgment by deducting therefrom the amount allowed for interest, without any appearance on the part of the defendant. The

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plaintiff claims that this cured the jurisdictional defect, if any, concerning the subject-matter. But if the court was without jurisdiction to enter the judgment in the first instance, it was equally without jurisdiction to amend it.

Discussion of the other questions raised by the appellant is rendered unnecessary by the conclusions which we have reached.

Order reversed.

AMERICAN BRIDGE COMPANY OF NEW YORK v. G. T. HONSTAIN and Others.[1]

January 24, 1913.

Nos. 17,704—(39).

Mechanic's lien — different items in one lien statement.

In a claim for a mechanic's lien, which includes different items of material furnished to the contractor at different times during the progress of the work, at an agreed price for each item, if all the materials are furnished for the same job, as the construction of a building, they may be all included in one lien; and the lien statement is filed in time, if within 90 days after the last item is furnished.

Finding sustained by evidence.

The finding of the trial court that all the materials furnished by respondent to the contractor in this case, including the last item, were furnished to the contractor and used in the construction of the building, to enable the contractor to comply with and fulfil the terms of his contract, is sustained by the evidence.

In an action in the district court for Hennepin county to foreclose mechanic's liens, the Crown Iron Works Company sought to

[1] Reported in 139 N. W. 619.

Note.—As to the right to tack different contracts to perform labor or furnish material for purpose of extending time to file lien, see note in 15 L.R.A. (N.S.) 299.

The question of the effect of the addition of new items to extend time for filing lien is discussed in a note in 35 L.R.A.(N.S.) 901.

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recover personal judgment against defendant Honstain for the sum of $811 and to foreclose a mechanic's lien therefor. The case was tried before Holt, J., who made findings of fact and ordered judgment in favor of the iron works company against defendant Honstain for the amount demanded, that the judgment be decreed a lien upon the premises in question, and that they be sold to satisfy the judgment and the costs of sale. The motion of the Northwestern Consolidated Milling Company for amended findings of fact and conclusions of law was denied. From an order denying a motion of the last named company for a new trial of the lien claim of the iron works company, the milling company appealed. Affirmed.

James D. Shearer, for appellant.

A. B. Darelius, for respondents.

BUNN, J.

This is a mechanic's lien action. The trial court found that the Crown Iron Works Company was entitled to a lien in the sum of $811 upon the real estate involved. The owner, defendant Northwestern Consolidated Milling Company, appeals from an order denying its motion for a new trial.

The facts are as follows:

Prior to June 10, 1908, defendant Honstain entered into a contract with the milling company, by the terms of which, in consideration of the payment of the contract price, he agreed to construct for the company, upon the real estate involved, a grain elevator, complete for the storing and handling of grain, including automatic receiving separators, wheat pits, track sheds, framing for shovel machinery, garner bins, and mechanical contrivances for the storing and handling of grain. Honstain commenced work under the contract June 10, 1908, and completed the elevator on March 26, 1909. He purchased of respondent structural iron and steel of the value of $2,811, which was used in the construction of the elevator. The first item was furnished October 14, 1908, and consisted of material used for the framing of track shed. Honstain agreed to pay for this

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item $2,150. The second item was for material used for shovel machinery supports, which was furnished December 4, 1908, at the agreed price of $572. The third and last item of the material furnished by respondent to Honstain, and used in the construction of the elevator, was for material of the value of $89, furnished March 26, 1909, and used to remedy a defect in the garners. At this time the elevator had been turned over to the milling company.

The lien statement of respondent was filed June 21, 1909. The main contention of appellant is that the materials were furnished by respondent under three "separate, individual, and unrelated" contracts, and that, the lien statement not having been filed within 90 days after the first and second items were furnished, the right to a lien for the materials furnished under the first two contracts has been lost.

There is no fair question as to the good faith of respondent, and therefore no reason for a suspicion that the last item was furnished solely to keep alive or restore the right to a lien for the materials previously furnished. There is some ground for appellant's contention in the decided cases, but those in this state upon which it relies are distinguishable.

In Fitzpatrick v. Ernst, 102 Minn. 195, 113 N. W. 4, the lien claimant had agreed with the owner of a building to make all the alterations and repairs which the owner would need in the future at the regular price of work and material, with 10 per cent. added. From time to time the owner would order repairs and the work was done as ordered. It was held that the trial court was justified in finding that the work consisted of a number of independent jobs, and that plaintiff was entitled to a lien for only those portions of the work done within 90 days prior to the filing of the lien statement. There was no "one job" in the case cited, and the materialman dealt directly with the owner. That the situation would be different when the materials are furnished for one general purpose, as for the erection of a building, is recognized in the opinion.

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In Northwestern Lumber & W. Co. v. Parker, 118 Minn. 211, 136 N. W. 855, the appeal was from an order granting a new trial after a decision in favor of the lien claimant. It was said by this court that there was a fair doubt whether the lien statement included work done and material furnished under one or several distinct and separate contracts; and the Ernst case is cited to the proposition that if there were several independent contracts all could not be included in one statement. But it was said, as a guide to the trial court, that "a substantial rather than a technical view should be taken of the question whether its claim is founded upon one or upon separate and independent contracts."

These cases, as well as those cited by appellant from other courts, apply a rule that is not to be questioned, but do the facts in the case at bar warrant the application of that rule here? We think not.

Here Honstain's contract was for a complete building. He bought his material in the market, as he needed it, at the best prices he could obtain. Three times during the performance of his contract he purchased needed material from respondent, each time at an agreed price. On reason it should not be held that respondent was obliged to file a separate lien statement for each bill of materials furnished and used in the construction, and we think the authorities do not justify such a decision. The statute (R. L. 1905, § 3505) gives a lien to whomever contributes to the improvement of real estate by performing labor or furnishing materials, whether under contract with the owner, or *at the instance of* any contractor of such owner, for the price or value of such contribution. In the case of materials furnished "at the instance of a contractor," the lien is not for the contract price, but for the reasonable value. That the materials are furnished at different times during the progress of the work is unimportant; and it would also seem that the arrangements between the contractor and the materialman, whether, as between them, each item furnished is a separate contract and at a separate agreed price, is of no moment in considering the right of lien. As between the parties interested in the lien, the claimant and the owner, the ques-

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tion is not under what kind of a contract the materials were sold to the contractor, but were they all furnished for one job and all used in the building, and what is their reasonable value? As between these parties, there is but one transaction, one job—the construction of the building.

The language of Chief Justice Gilfillan, in Frankoviz v. Smith, 34 Minn. 403, 26 N. W. 225, is in point here:

"Where a lien is claimed for different items, delivered at different times, the right is not necessarily a right to an independent lien for each item furnished. If it were, and it were necessary for the materialman to proceed separately for each item in, perhaps, a long line of items delivered at different times, the right would in many cases be of very little value. A great many different items may be delivered at different times, and there be but one lien, including all of them. In such case the time for filing the affidavit and account begins to run from the time when the delivery was completed, that is, when the last item was delivered, and in such case it is no objection to any item that it was delivered a longer time before the filing than is specified in the statute for the filing; for the whole account is treated as a unit. And this is usually the case where the articles are delivered, though at different times, under one contract for the same general purpose,—as for the purpose of constructing a building, or for the purpose of repairing it,—but would not be the case when furnished for different purposes, as at one time for constructing, and at another time for repairing. * * * The builder rarely procures all the materials * * * at one time, but usually procures them from time to time as they are needed in the progress of the work. When they are so procured, all that are got for the same job—that is, for constructing the building, if that is the job in hand, or for making repairs, if it is that which the contractor has to do—are deemed to be got upon an account current, upon the same contract or purchase as it were; and the aggregate, when they have all been furnished, constitutes one lien."

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It is true that in the Frankoviz case it did not appear that the contractor and materialman agreed on the price of each item as it was ordered, but that is not, as we view it, a material consideration. The cases of State Sash Mnfg. Co. v. Norwegian Seminary, 45 Minn. 254, 47 N. W. 796, and St. Paul & M. Pressed Brick Co. v. Stout, 45 Minn. 327, 47 N. W. 974, are conclusive on this point.

In the former case part of the materials were furnished without an agreement as to the price to be paid, while one item was furnished under a separate written contract at an agreed price. It was held that one lien was properly filed for all the materials furnished for the job. In the latter case the contractor bought a bill of brick at an agreed price in July. He erred in his computation of the number needed, and in September ordered a further supply, for which the dealer charged a higher price. It was held that, as all the materials were purchased for and used in the completion of the same building contract, all could be included in one lien, filed within the statutory time after the last order was delivered. It is hardly open to question, under these authorities and others, and on principle, that the lien statement in the case at bar was filed in time, and that all the materials furnished by respondent and used in the construction were properly included in one lien statement. We so hold.

2. It is further contended by appellant that the material furnished by respondent in March for the raising of the garners was not furnished under the Honstain contract, but for the alteration of a completed structure, after the same had been accepted as completed in accordance with the contract and the contractor discharged. This material was used to raise the tops of the garners; it being discovered that as constructed they did not have the capacity called for by the contract. The trial court found that all the materials, including this last item, were furnished by Honstain to enable him to comply with and fulfil the terms of his contract, and the evidence, we hold, amply sustains this finding. The conclusion that respondent was entitled to include this item in his lien necessarily follows.

Order affirmed.

HOLT, J., having tried the case in the court below, took no part.

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WILLIAM R. KINYON and Others v. TORGER CHRISTIANSON.[1]

January 24, 1913.

Nos. 17,778—(143).

Land grant — cases followed.

In an action involving title to a tract of land within the indemnity limits of the land grant to the Hastings & Dakota Railway Company, the controversy being between a settler upon the land under the claim of homestead rights, and the successor in interest of the railroad company, it is *held* that the facts present a case substantially similar to Osborn v. Froyseth, 105 Minn. 16, and Osborn v. Froyseth, 216 U. S. 571, and the decisions there rendered are followed and applied.

Action of ejectment in the district court for Chippewa county in which William R. Kinyon, George R. Kinyon and Thomas H. Kelly, as trustees under the last will of William H. Kelly, deceased, were substituted as plaintiffs. The facts are stated in the opinion.

The answer, among other matters, alleged that during the year 1888 defendant settled upon the land with intent to make entry thereon and to claim it as homestead under the United States homestead laws, being advised that whatever claim to said land had existed in favor of the Hastings & Dakota Railway Company was or would be entirely extinguished; that he constructed thereon a house, barn and other buildings, and has resided thereon with his family without interruption since; that in December, 1891, he offered a homestead application of the land in due form of law at the proper land office, with tender of all necessary fees, but the same was disallowed on the pretended claim that it had been selected as indemnity land by the railway company; that the pretended selection was void and the rejection of his homestead application was erroneous; and prayed

[1] Reported in 139 N. W. 597.

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that the pretended title of plaintiffs be annulled and defendant's title be quieted and confirmed against the claims of plaintiffs.

The reply, among other matters, alleged that the exact issues involved in the action were involved in an action prosecuted by the defendant in the United States land office and Department of the Interior to obtain allowance of his application to enter the land as a homestead, which was contested by Russell Sage, grantor of plaintiffs' testator; that the application was made in 1891, rejected by the commissioner of the land office in September, 1894, on the ground that defendant did not allege settlement prior to the company's selection; that notice of the decision was served upon defendant in October, 1894, no appeal was ever taken by him, and the case was closed adversely to defendant in February, 1895; that by such adjudication the matters and facts litigated in this action were finally determined on the merits, and defendant was barred thereby from maintaining the defense interposed by his answer. The reply also alleged that the ground of relief set out in the answer did not accrue within six years after the commencement of this action nor within six years before the time it was set forth in the answer and was barred by the statutes of limitations.

The case was tried before Qvale, J., who made findings and ordered judgment that plaintiffs were not entitled to any relief. From the judgment entered pursuant to the order, plaintiffs appealed. Affirmed.

Owen Morris, for appellants.

C. A. Fosnes and *Alfred K. Fosnes,* for respondent.

Brown, C. J.

The land in controversy in this action was located within the indemnity limits of the land grant to the Hastings & Dakota Railway Company, as granted and fixed by the act of Congress of July 4, 1866, and was in 1883 selected by that company, with other lands in the same limits, to supply lands lost within the place limits of the grant. This selection was held by the Interior Department of the

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general government not in compliance with the regulations controlling such selections, and it was rejected on October 23, 1891. Prior to that date, all land within the indemnity limits of this grant had been withdrawn from entry under the homestead and pre-emption laws. But by the order rejecting the selection made by the railroad company, just referred to, the land was thrown open to settlement "by the first legal applicant under the public land laws" of the United States. That order was issued on October 23, 1891.

Defendant, a naturalized citizen of the United States, and a qualified homesteader, settled upon the land in the year 1888, and has since continuously resided thereon with his family, making extensive improvements in the construction of buildings upon and otherwise improving the land for agricultural purposes. The land was not open to entry at the time of this settlement, but defendant's intention and purpose was to claim the same under the homestead laws whenever it should be subject to entry thereunder. It became so subject to entry on the date of the order of the Interior Department rejecting the railroad company's selection thereof as heretofore stated; and in December, 1891, defendant duly filed an application to enter the same under the homestead laws. His application was rejected on the ground that it had been preceded by a second selection on behalf of the railway company, which selection was made on October 29, 1891, about six days after the rejection of the former selection. The second selection was made by Russell Sage, trustee, successor to the rights of the railway company, and was formally approved by the Land Department, and the land certified to the state for the benefit of the railway company on March 29, 1897.

Plaintiffs have succeeded to the rights of the company and of Sage, to whom the land was transferred by the company in trust for the benefit of stockholders. They brought this action to recover possession of the land, basing their claim of title upon the approval of the second railway selection and certification of the land thereunder by the Interior Department. Defendant relies upon his settlement upon the land under the homestead laws, his continued residence thereon,

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and cultivation and improvement of the same, together with his application to enter the land as a homestead, all of which he insists vests in him rights paramount and superior to any claim of plaintiffs.

This statement of the case is deemed sufficient to an understanding of the present decision. A more detailed statement will be found in Osborn v. Froyseth, 216 U. S. 571, 30 Sup. Ct. 420, 54 L. ed. 619, a case involving the same land grant, and a controversy substantially identical with that at bar.

The trial court held that the rights of defendant were superior to those of plaintiffs, and ordered judgment accordingly. Judgment was so entered, and plaintiffs appealed.

We are unable to distinguish the case from the facts presented in the Froyseth case above referred to, also reported in 105 Minn. 16, 119 N. W. 1113, and we follow and apply the decision there rendered. Every question involved in the case at bar was there presented and disposed of adversely to plaintiffs' contention.

It appeared in that case that subsequent to the first selection by the railroad company, but long before the second selection, defendant in that action settled upon the land with the bona fide intention of claiming the same under the homestead laws. After the land had been thrown open to settlement by the order of the department rejecting the railroad selection of 1883, defendant made application to enter the land as a homestead. That application was made, as in the case at bar, after the second selection by the railroad company, but before the approval thereof. The Supreme Court, speaking through Mr. Justice Lurton, held that defendant's settlement upon the land under the facts stated was the initiation of proceedings to acquire the land under the homestead laws, and that the land was not subject to appropriation by the railroad company as indemnity land at the time of its second selection. That precise situation is presented in the case at bar.

The further claim of plaintiffs in this case, namely, that the second selection was merely an amendment or correction of the first, and therefore that plaintiffs' rights relate back to the date of the first se-

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lection, was also decided adversely to plaintiffs in the Froyseth case. The court there said [at page 577] that "the rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of plaintiff in error to that selection." Nor is it important that defendant's application to enter the land as a homestead did not disclose a settlement upon the same prior to the second railroad selection. This point is fully covered by the opinion of the court in that case.

The further suggestion here made that defendant's application was defective and insufficient is not well taken. The plaintiffs' reply admits the application to file on the land, and, moreover, the application was accepted by the department as sufficient, and it was rejected on its merits.

This embraces all that is necessary to say in the case. The Froyseth case covers all questions presented, and, as we understand, has not been overruled or departed from by the Federal court. Weyerhaeuser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. 300, 55 L. ed. 258, and Northern Pacific Ry. Co. v. Wass, 219 U. S. 426, 31 Sup. Ct. 321, 55 L. ed. 280, are clearly distinguishable from the Froyseth case. In those cases it appeared that, though defendant settled upon the land prior to the second selection by the railroad company, he made no effort to perfect his homestead rights, by filing a homestead application or otherwise, until long after the selection had been approved and the title certified to the railroad company. This fact differentiates the cases. Morris v. Svor, 118 Minn. 344, 136 N. W. 852; Morris v. Svor, 114 Minn. 303, 131 N. W. 324.

Judgment affirmed.

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EDWARD F. PICKELL v. ST. PAUL CITY RAILWAY COMPANY.[1]

January 24, 1913.

Nos. 17,812—(168).

Question for jury.

1. The motorman on appellant's car saw a child seven years and four months old near the curb, which was about 25 feet from his track. He saw her start to run as if to cross the track. There is evidence that she went on a diagonal with her back partly toward the car and that she fell on the track 20 feet ahead of the car. The fender and vestibule ran over her. It was a question for the jury whether the motorman had his car under proper control and stopped as soon as reasonable prudence required. Street cars and pedestrians have equal rights in streets. It is as much the duty of the motorman to avoid pedestrians as it is for pedestrians to avoid the car. This duty of the motorman is emphasized when the pedestrian is a child.

Question for jury.

2. The motorman sounded his gong, but did not blow the whistle with which the car was equipped. *Held*, a question for the jury whether reasonable prudence required that he should have sounded the whistle.

Same.

3. Question whether a child seven years old was negligent in running in front of the car in the manner above described was one of fact for the jury.

Modification of request to charge.

4. Appellant requested the court to charge that, if the motorman used reasonable care in stopping the car, respondent could not recover. The court modified this by charging that they could still take into consideration the failure to sound the whistle. *Held*, no error.

Refusal to charge.

5. The refusal of the court to charge that the sounding of the whistle would

[1] Reported in 139 N. W. 616.

Note.—As to what acts of child in attempting to cross street car tracks are negligence as matter of law, see note in 11 L.R.A.(N.S.) 166.

The authorities on the duty to avoid injuring children on track are collated in a note in 25 L.R.A. 663.

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have been useless if the child saw the car, *held*, under the circumstances in this case, not error.

Excessive damages.

6. The damages are not excessive.

Action in the district court for Ramsey county by the father of Edna Pickell, acting in her behalf, to recover $10,000 for personal injury. The complaint, after setting out the circumstances of the accident, alleged that it occurred on a bright, clear day and the track was wholly unobstructed at the time, was straight and the view thereof and of objects near thereto wholly unobstructed for a distance of more than 400 yards at the place of the accident. The complaint set out the substance of certain ordinances of the city of St. Paul forbidding the person in control of an electric street railway car to allow a greater speed than 12 miles an hour. The answer admitted that sections 1055, 1056 and 1057 of the 1907 compilation of ordinances of the city were substantially as alleged in the complaint. It further alleged that whatever injury Edna Pickell received was not due to, or caused by, any negligence on its part, but was due to, and caused by, her own negligence. The reply denied the new matter in the answer. The case was tried before Kelly, J., and a jury which returned a verdict in favor of plaintiff for $2,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

W. D. Dwyer, for appellant.

John W. Willis and *J. C. Zehnder,* for respondent.

HALLAM, J.

Respondent Edna Pickell was injured by contact with a street car. She was seven years and four months old. She started from the curb across the street running "as a child runs." When she came to the car track she stumbled and fell. One witness says she fell 15 feet in front of the car. Another placed the distance at 20 feet. The fender and vestibule of the car passed over her. When it stopped she was just forward of the front truck. The jury found for plaintiff and assessed her damages at $2,500. Defendant moved in the alternative

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for judgment notwithstanding the verdict or for a new trial. Both motions were denied and defendant appealed.

Appellant contends on this appeal:

That there was no sufficient evidence of negligence of the defendant.

That the respondent was guilty of contributory negligence.

That certain errors were made in the charge.

That the damages were excessive.

We cannot sustain these contentions.

There was sufficient evidence to sustain a finding of negligence on the part of the defendant; that is, of the motorman in charge of the car. Respondent contends that the motorman was negligent in his management of the car in that he did not keep his car under proper control and stop it with reasonable promptness, and in that he did not give proper signals of its approach. There was evidence from which the jury might so find.

1. First as to the control of the car: The child left the curb on a run. There is evidence that she went on a diagonal with her back partially turned toward the car. The motorman testified that when she left the curb he could see that she was trying to cross the street. At some point between the curb and the car track she hesitated and then started again. Her hesitation gave the impression to some of the eyewitnesses that she would stop and let the car go by. The motorman testified that when she hesitated she looked up at him, but no other witness so testified. As soon as she started again, after hesitating, the motorman considered the situation one of danger, for he said that he threw the reverse lever and put on the brakes.

In determining whether the motorman kept his car under proper control and stopped with reasonable promptness, it becomes material to consider where the child was when this incident occurred.

The motorman testified that she hesitated right near the curb. Several maps were introduced in evidence to show distances between material points on the street. None of these maps have been returned to this court. Deciphering the oral evidence without them as best we may, it appears that the distance from the curb to the nearest rail of the track on which this car was running is upwards of 25 feet on a

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straight line; on a diagonal, as some witnesses said the child ran, it is approximately 37 feet. She traveled this distance and then reached the track and fell, according to the motorman's testimony, 15 feet ahead of the car; according to the testimony of another witness, 20 feet ahead of the car. The car was going about nine miles an hour. There was testimony of witnesses who watched both the child and the car that the car was going the faster and had a longer distance to travel than the child to reach the point of collision. The motorman said that this car, going at a speed of nine miles an hour, could be stopped in a space of from 40 to 45 feet.

It is perfectly manifest that there is here ample basis for the finding by the jury that the motorman could have stopped his car between the time the child last started toward it and the time of the collision. One of the defendant's witnesses testified that the jerk from the stopping of the car came after the child was lying on the track, and the jury might properly find that such was the fact. This evidence is sufficient to sustain a finding that the failure to sooner stop the car was negligence.

There is no priority of right between a pedestrian on the street and a street car on its track. Neither has the right of way. Life and limb are of more consequence than quick transit. It is as much the duty of the motorman to avoid contact with a pedestrian as it is for a pedestrian to keep out of the way of the car. Shea v. St. Paul City Ry. Co. 50 Minn. 395, 52 N. W. 902; Bremer v. St. Paul City Ry. Co. 107 Minn. 326, 332, 120 N. W. 382, 21 L.R.A.(N.S.) 887, note.

One witness testified that he saw this child playing on the street while the car was nearly a block away. She was in plain sight of the motorman. Reasonable prudence demanded that he should exercise greater car in keeping his car under control than would have been required had she not been there. When a motorman discovers a small child running toward the track on the street ahead of him, ordinary care requires that he should keep his car under very sure control. Strutzel v. St. Paul City Ry. Co. 47 Minn. 543, 50 N. W. 690; Cameron v. Duluth-Superior Traction Co. 94 Minn. 104, 102 N. W. 208.

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2. The question whether the motorman negligently failed to give proper signals was also for the jury. We think the evidence establishes the fact that the motorman rang his gong. The only evidence to the contrary is that of witnesses who simply said they did not hear it. This is not sufficient. Moran v. Eastern Ry. of Minn. 48 Minn. 46, 50 N. W. 930. It appears, however, that the car was equipped with an emergency whistle designed for use in just such cases as this. This whistle was not sounded. The jury was entitled to consider this fact as an element of the motorman's alleged negligence. From the above recital of facts it appears that there was evidence to sustain a finding that there was ample time to sound the whistle after the motorman saw the child in what he himself considered to be a position of peril.

3. Appellant contends that the child was guilty of contributory negligence as a matter of law. We are of the opinion that the evidence sustains the finding that such contributory negligence was not established.

Respondent was a little girl, seven years and four months old. Some discretion must be expected of a child of that age, but manifestly not the same measure of discretion as is required of an adult. She is entitled to have her conduct judged in the light of her years. Hepfel v. St. Paul, M. & M. Ry. Co. 49 Minn. 263, 51 N. W. 1049. There was testimony that she was engaged in childish play. The evidence is not conclusive that she saw the car. If she did not, it cannot be said as a matter of law that a child of such tender years is, under the circumstances here disclosed, guilty of contributory negligence in not looking. Holmgren v. Twin City Rapid Transit Co. 61 Minn. 85, 63 N. W. 270. This precaution is not required at all events of adults. Shea v. St. Paul City Ry. Co. 50 Minn. 395, 52 N. W. 902; Armstead v. Mendenhall, 83 Minn. 136, 139, 85 N. W. 929; Peterson v. Minneapolis Street Ry. Co. 90 Minn. 52, 56, 95 N. W. 751. If she did look and did see the car, it was at a time when, according to the motorman's testimony, she was 25 feet from the track on a straight line; 37 feet from it on the diagonal line that she traveled, with the car substantially farther away. Her calculations of speed and distances and of proper conduct were childish calculations.

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Miscalculation is not necessarily contributory negligence in such a case even in an adult (O'Brien v. St. Paul City Ry. Co. 98 Minn. 205, 209, 108 N. W. 805), much less in a child.

Her conduct in failing to stop, even if she saw the car, cannot be judged by the same standard as the conduct of the motorman in failing to stop his car, for the two were not equal in point of discretion required of them. She would in fact have crossed the track at least 15 or 20 feet ahead of the car had she not stumbled. We cannot hold that an attempt on the part of this child to cross the track in front of a car at the distance here disclosed was contributory negligence as a matter of law.

4. Error is assigned in that the court modified appellant's seventh request to charge. The request is as follows:

"If you find from the evidence in this case that the child, Edna Pickell, as the car approached her, was outside of the paved street—that is, upon the boulevard or sidewalk—and that she suddenly darted from the sidewalk or boulevard into the paved street and towards the track upon which the car was running, and that at the moment the motorman saw her leave the curb to the street he used reasonable care and caution to stop his car, then and in that case the plaintiff herein cannot recover."

The court gave this charge, but added the following:

"I qualify that by saying, provided you also find that the failure of the motorman to sound the whistle on the car did not affect the happening of the accident. If it did, you must consider then the effect of that failure in determining this question."

We cannot hold that this was error. As above indicated, the failure to sound the whistle was one of the matters proper to be considered in determining whether the management of this car by the motorman was negligent. This is all that this additional instruction really means.

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5. At the conclusion of the charge counsel for appellant addressed the court as follows:

"Your Honor, I have in mind that the court mentioned that the motorman stated that the girl looked at him. If the girl did look at him and saw the car, the sounding of the whistle or the ringing of that bell would have been useless."

The court said: "Well, I will leave that to the jury. I cannot tell what effect it might have had upon the child."

This is assigned as error. We cannot so hold. If, as the motorman testified, the child was then near the curb, we cannot say as a matter of law that a shrill blast of the whistle would have been of no avail. In fact, it seems clear that it would have been effective.

6. Plaintiff contends that the damages assessed are excessive. Respondent was a little over seven years old. She sustained a fracture of the left femur or thigh bone. The result will be a permanent shortening of the leg. Her experts testified that the shortening is three-fourths of an inch. This causes a slight limp in her walk, some curvature of the spine, with pain and sensitiveness in the vertebræ; some obstruction in the case of childbirth. It has a detrimental effect on general health, manifested by nervousness, weariness, and sometimes neuralgia. We cannot say that the amount allowed was excessive.

Order affirmed.

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C. A. PEASLEE v. RAILWAY TRANSFER COMPANY OF MINNEAPOLIS.[1]

January 24, 1913.

Nos. 17,820—(166).

Questions for jury.

In this, a personal injury action, the evidence on the issues of defendant's negligence and plaintiff's contributory negligence was such that the court was not warranted in withdrawing either from the jury or directing a verdict for defendant.

Charge to jury.

It was not error for the court, in view of defendant's contentions at the trial, to instruct the jury that, as a matter of law, plaintiff was not negligent merely by reason of deviating from the usual course in walking upon a public street.

Verdict not excessive.

Verdict of $4,158 *held* not excessive for a broken leg near the hip where a permanent shortening of one inch and a quarter, deformity of the bone, and wasting of the muscles of the leg resulted. Besides it appeared that in wages, hospital, and medical attendance plaintiff had lost or paid $750, and that he had suffered severe pains which he was not free from at the trial, more than a year after the injury.

Action in the district court for Hennepin county to recover $5,000 for personal injury. The allegation of the complaint in respect to defendant's negligence is quoted in the seventh paragraph of the opinion. The answer alleged that if the accident occurred it was not due to any negligence whatsoever on the part of defendant or any of its employees, but was due to plaintiff's failure to exercise ordinary care for his own safety. The case was tried before Waite, J., who at the close of the testimony denied defend-

[1] Reported in 139 N. W. 613.

Note.—On the question of the care required of one in sudden emergency, see note in 37 L.R.A.(N.S.) 43.

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ant's motion for an instructed verdict, and a jury which returned a verdict for $4,158. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

W. H. Bremner, F. M. Miner and *George W. Seevers,* for appellant.

Larrabee & Davies, for respondent.

HOLT, J.

In Minneapolis, on the west side of the river, Sixth avenue south is the main thoroughfare to the milling district. Crossing this avenue at right angles and running in a southeasterly and northwesterly direction parallel with the river is Second street. Adjoining this street on the north are four large flour mills with loading platforms extending up to, and in some places encroaching on, Second street. Of these mills the Anchor mill comes up to the easterly line of Sixth avenue south, thence easterly along Second street are located Washburn C, B, and A mills.

The whole of Second street, with the exception of a strip 15 or 20 feet on the southerly side, is occupied by railway tracks. From one of these tracks, designated in the record as No. 2, being the south-bound main, located just north of the center of Second street, diverge several spurs running to the loading platforms of these mills. Of these spurs one, called track 6, diverges from the main track about 100 feet west of the west line of Sixth avenue south, runs northeasterly along the loading platform in front of the Anchor mill, at the end of which it stops; the next spur, called track 5, diverges near the center of Sixth avenue south, parallels track 6, extending about 40 feet further east, and ends at the west end of the loading platform of Washburn C mill; track 4 is a spur diverging from No. 2 about 30 feet east of the east line of Sixth avenue south, paralleling track 5 and running in front of the loading platforms of the Washburn mills mentioned.

A large number of men are employed at these mills day and night. At midnight some shifts change, and also some men go to Washington avenue, a block farther south, for lunch. The usual course

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taken by the men at the Washburn mills in going from the mills to Washington avenue is to walk westerly on the loading platform of those mills until the southwest corner thereof is reached, where steps lead down to the ground between spur tracks designated as tracks 4 and 5, thence traveling between these till they run into the main track No. 2, thence westerly along or upon this track to Sixth avenue south, thence southerly along said avenue.

Plaintiff was employed in one of the Washburn mills. About midnight on February 28, 1911, he left the mill, walking westerly on the loading platform and down the steps at the southwest corner thereof, then continued between the tracks 4 and 5 mentioned until, as he claims, he found that, where track 4 joined or terminated into main track No. 2, cars obstructed his progress west, as well as cars upon track 5. He then crossed over between two cars on track 5 to track 6 and proceeded southwesterly on the latter track, when suddenly a car bore down on him from the west. Concluding that the best way to save himself was to jump on the loading platform of the Anchor mill, he made the attempt, but did not succeed in getting clear onto the platform. His body below the hips was caught between the car and the edge of the platform, and his leg near the hip broken and severely injured.

The jury returned a verdict for $4,158. Defendant appeals from the order denying its motion for judgment non obstante, as well as its motion for a new trial.

The contentions of defendant are: (a) Defendant's negligence was not established; (b) plaintiff's contributory negligence conclusively appears; (c) the court erred in its charge; and (d) the damages are excessive.

Plaintiff alleged that defendant negligently and "without the giving of signal by bell, whistle, or otherwise, and without having any lights upon its cars or any employee to clear its tracks ahead of its cars, kicked, ran, and propelled one of its cars" against plaintiff, injuring him. Plaintiff undertook to prove that the uniform custom and practice of defendant, when running in cars on the spurs to the loading platforms of these mills during nighttime, was to have a man with a lighted lantern either walking ahead of the

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car as it was pushed in, or else stationed on top of the car at the front end thereof. There was evidence to establish such custom, and failure to observe it with regard to the car which injured plaintiff. Even if no custom existed with reference thereto, we think it was for the jury to say whether pushing a railway car in the dark along a much traveled public street, without any light or person at the front to give warning of its approach, was negligence.

In determining whether plaintiff was not, as a matter of law, guilty of contributory negligence, the customary way in which cars were moved there, if any there was, or else the manner in which ordinary care under the existing conditions would require cars to be run upon these tracks, must be considered as matters bearing on plaintiff's conduct; also the fact that the place of the accident was a public street. Plaintiff had a right to expect, until the contrary appeared, that defendant would use ordinary care to avoid collision with other users of the street. In backing over Sixth avenue during the nighttime, defendant conceded that the practice was to have a man with a lighted lantern either on the top of the front end of the car, or else walking ahead of it. It would not be difficult for the jury, with this concession and the testimony of plaintiff and his witnesses as to defendant's practice, to come to the conclusion that the custom was also to give notice or warning of the approach of cars pushed in on any of these tracks on Second street by a lighted lantern carried by a man either on top of the front end of the car, or immediately in front and ahead of it. For it may not be amiss to say that the same precaution to warn persons of an approaching car ought to be taken on Second street generally as is done where it crosses Sixth avenue.

There is also evidence that the street electric light was not lit, and that the car approached plaintiff from out of the darkness, so that he could not see it until it came right upon him. When sudden danger confronted plaintiff, he may have erred in jumping for the platform instead of jumping to the space between tracks 5 and 6, but acting upon an error of judgment in an unexpected emergency is not, as a matter of law, negligence.

Nor may we say that by walking on track 6 instead of between

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that and track 5, on which cars were then standing, plaintiff was per se guilty of negligence. The ground occupied by the tracks, as well as the spaces between, were part of the public street open for public travel, and we may not say that, because cars were frequently moved upon the tracks, it would constitute negligence, as a matter of law, to walk over or along the tracks.

Evidently defendant contended at the trial that, because plaintiff did not proceed between tracks 4 and 5, the usual course of the men in going to Sixth avenue, and because he walked upon a track instead of between tracks, he was guilty of negligence, as a matter of law. For the court endeavored to give the jury the correct view upon this proposition by this instruction:

"I think you ought to consider, as a matter of law, that he [plaintiff] was not negligent merely by reason of the fact that he went out—where the evidence tends to show he was—of the beaten path. There is evidence tending to show that people leaving the platform of the Washburn-Crosby mills went in a diagonal direction between tracks 4 and 5 and over to the corner of Sixth avenue south and Second street. He had a right, however, to take any course he chose, and taking any course was not in itself negligence, although he placed himself in a position which was more dangerous than it would have been if he had taken the other course; and the care he ought to have exercised to protect himself would be proportionately increased."

Defendant insists that by this instruction the jury were told that plaintiff was not negligent in taking a dangerous course when a safe one was open to him. Defendant called attention to no inaccuracy in the charge at the time. And we think that, considering the charge as a whole, the quoted part is not open to the construction contended for. It is clear that the court left the issue of plaintiff's negligence in every aspect to the jury; stating that the mere fact that plaintiff was upon a part of the street of greater

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danger does not, of itself, establish negligence, as a matter of law. In fact, the court conveys the idea that the care to be exercised for one's protection must be commensurate with the dangers of the situation. The greater the danger, the higher the care required. The jury was instructed that if plaintiff did not use his senses as a fairly intelligent and prudent person ought to do, and would do, in such a situation, and, by failing to use his senses, got into the predicament which resulted in this injury, he would not be entitled to recover. And in another part the court said: "If you think he [plaintiff] was negligent * * * and did not act as an ordinarily prudent man would have acted under the circumstances, and by reason of that, in part, he was injured, then that would end the case."

The verdict is assailed as excessive. The special damages of loss of wages, doctors' and hospital expenses, appear to be $750, leaving $3,400 for pain and permanent injury. We are cited to cases where damages not so large as these for somewhat similar injuries were reduced. Slette v. Great Northern Ry. Co. 53 Minn. 341, 55 N. W. 137; Johnson v. St. Paul City Ry. Co. 67 Minn. 260, 69 N. W. 900, 36 L.R.A. 586; Northrup v. Hayward, 99 Minn. 299, 109 N. W. 241; Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

In the two last cases the reductions were made by the trial courts, and this court held that, as reduced, the amount of recovery allowed was not excessive.

In the Johnson case plaintiff was 75 years old, and, in view of that fact, the court reduced the verdict to $2,500, although the injury to an ankle was very serious. The court took into consideration that the purchasing power of money was then very great, while we may now take notice that the reverse is true. In the Slette case, a man 30 years old sustained a transverse fracture of the thigh bone. The testimony was that the leg was at the trial as good as ever, save it was from one-half to three-fourths of an inch shorter than before. His earning capacity was only $35 per month. This court reduced the verdict from $4,100 to $2,100. The age of plaintiff is not made to appear except it may be inferred that since he had worked in these mills for 30 years he must be close to 50

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years old. He was valuable to his employer, for while yet on crutches he went back to work at the same wages he had previous to the injury, namely, $100 per month. The leg was shortened an inch and a quarter, a wasting of the muscles, a tilting of the pelvis, and an enlargement of the anterior portion of the thigh are permanent injuries. Plaintiff testified that pains attend every step he takes with the injured leg. While the damages awarded seem liberal, we do not think they are so large that we ought to interfere after the same have been approved by the trial court.

Order affirmed.

TRAVELERS INDEMNITY COMPANY v. LESLIE H. FAWKES.[1]

January 24, 1913.

Nos. 17,822—(156).

Contract of bailment — evidence of breach.

Where, in an action by the bailor against the bailee upon an ordinary contract of nongratuitous bailment, the defendant admitted the receipt of the property and his inability to return it, a prima facie breach of the contract was thereby established, to meet which it devolved upon the defendant to prove that he exercised ordinary care in keeping the property.

Care required of bailee.

Where the proprietor of an automobile repair shop had notice that his foreman was possessed of proclivities rendering it likely that he would

[1] Reported in 139 N. W. 703.

Note.—As to whether the breach of duty to employ or retain none but competent servants may be inferred in fact from their incompetence, see note in 20 L.R.A.(N.S.) 322.

The authorities on the question of evidence of reputation to show incompetency of servant or master's knowledge thereof, are collated in a note in 33 L.R.A. (N.S.) 751.

The general question of the master's duty with respect to employment of servants is treated in a note in 48 L.R.A. 369.

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injure cars left at the shop for repairs, by taking them out at improper times and making unauthorized use of them, it was such proprietor's duty to exercise ordinary care to protect such cars from the danger of injury to which they were thus subjected.

Retaining servant — question for jury.

Action of the court, in an action for injury to an automobile in a collision which occurred while the foreman of the defendant's repair shop was using it for his own private purposes, in submitting to the jury the question as to whether the defendant was guilty of negligence in retaining such foreman in his employment, sustained.

Objection to complaint too late.

Contention that the complaint failed to state a cause of action *held*, in any event, too late when made for the first time on appeal.

Harmless variance.

Where the facts litigated were known to the defendant, a variance, if any, between the plaintiff's complaint and his proofs *held* harmless.

Estoppel by conduct.

Where the defendant in an action for injury to an automobile had acted virtually as appraiser between the plaintiff, an insurance company, and the owner of the machine, and the plaintiff had paid the owner the amount of the loss fixed by such appraisement, the defendant was estopped to introduce evidence as to the value of the machine.

No error.

Other claims of error considered, and *held* to be without merit.

Action in the district court for Hennepin county to recover $2,504.50. The substance of the complaint and answer will be found in the second and third paragraphs of the opinion. The case was tried before Waite, J., and a jury which returned a verdict for $2,489.50 in favor of plaintiff. At the hearing of defendant's motion for a new trial plaintiff moved in open court to be allowed to amend its complaint. The court allowed the amendments and denied the motion for a new trial. From an order denying defendant's motion for a new trial and allowing plaintiff's motion to amend the complaint, defendant appealed. Affirmed.

Larrabee & Davies, for appellant.

Keith, Evans, Thompson & Fairchild, for respondent.

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PHILIP E. BROWN, J.

Appeal by the defendant from an order allowing certain amendments of the complaint and denying him a new trial after verdict for the plaintiff for $2,489.50. The material allegations of the complaint are, in effect, as follows:

The Hudson Thurber Company, being the owner of an automobile, insured the same in the plaintiff company against damage from collision, to the extent of its intrinsic value at the time of injury. While this policy was in force, and in January or February. 1911, the insured delivered the car to the defendant in Minneapolis, who was carrying on the business of selling and repairing automobiles, for repairs, and while it was so in his possession the machine was damaged by a collision caused by the defendant's fault and negligence, and was thus practically destroyed. The amount of the loss was determined between the parties to the policy, at their request, by the defendant, with knowledge on his part that he was thus selected to act as appraiser to ascertain the amount thereof and the extent of the liability of the insurer to the insured, the amount so determined and fixed by the defendant being $2,504.50, which sum, less $15 as provided in the policy, the plaintiff paid to the insured, and by such payment the plaintiff became, pursuant to the terms of the policy, subrogated, to the extent of such payment, to the rights of the insured with respect to their claim for damages, etc. The complaint also contained a general allegation for damages in the sum of $2,489.50, and demanded judgment for $2,504.50.

The answer admitted that the defendant was engaged in the business of repairing automobiles as alleged, but denied all of the other allegations of the complaint.

A consideration of the alleged errors perspectively requires a recital of the general course of the trial. The plaintiff first introduced evidence tending to support substantially all of the allegations of the complaint, except the alleged negligence of the defendant, and no specific objection was made to any of the plaintiff's proofs on the ground of variance, and no motion was made whatever

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based on the pleadings during the trial, except as hereinafter mentioned. Nor did the defendant introduce any proofs materially contradicting those of the plaintiff, his proofs being practically confined to evidence tending to show that one Murphy had been since the fall of 1910, and was up to the time of the injury complained of, the foreman of his repair shop; that after some repairs had been made on the machine, but before the same were completed, Murphy took the machine out on the street to test it; and that after such trial had been made, and without the knowledge of or authority from the defendant, Murphy proceeded to run the car solely for his own pleasure and that of his friends during the night, imbibing intoxicating liquors meanwhile, until the accident. The defendant also introduced evidence tending to show that prior to the night of the collision Murphy's conduct had been good, but, on cross-examination, he admitted that theretofore he knew that Murphy "was out nights," "was one of the boys," "had been intoxicated," "knew he went out with the boys and had a pretty lively time," and further knew that his employees quite often took cars on the road to test them at night after repairing them, and this without direction from him; this matter being left for Murphy to direct.

The plaintiff, in rebuttal, introduced evidence to the effect that prior to the accident Murphy on one occasion remained out with a car, trying it, from 6 to 9 o'clock p. m., and that the defendant had notice thereof. One of the witnesses described Murphy's appearance before he became foreman, but while he was in the defendant's employment, as follows, "He used to come in some mornings and look like he was half dead," and with bloodshot eyes. Another of the defendant's employees testified that he had observed that during business hours, prior to the accident, Murphy, while in the workshop, was sometimes sleeping in the back of the cars and under the same; and that the defendant, more than once in conversation, spoke about Murphy being a good man if he would not get intoxicated.

At the close of the testimony the court denied the defendant's motion for a directed verdict, made substantially on the ground that it

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conclusively appeared that the car was injured by Murphy while he was not acting in the line of his duty or business, or within the scope of his authority, and while, without authority, he was using it for his own purposes and pleasure, and further on the ground that the plaintiff had not introduced sufficient evidence to constitute a cause of action, in that he had failed to establish that the defendant was negligent.

The court, in its charge, to which no exceptions were taken, left it for the jury to say, as the sole question of fact for their determination, whether the defendant exercised ordinary care in permitting Murphy to act as foreman of the repair shop, under the facts and circumstances disclosed by the evidence; and contemporaneously with the consideration of the defendant's motion for a new trial the court considered and granted an application by the plaintiff for leave to amend the complaint in certain formal particulars, so that its allegations would conform to the proofs.

With the foregoing résumé of the salient features of the case in mind, we will consider the sufficiency of the alleged errors as a basis for reversal; but it must be understood that we confine our observations to the theory upon which the case was submitted to the jury, expressing no opinion whether the trial court adopted the correct rule of law as applied to facts like those here presented.

1. The action is based upon an ordinary nongratuitous bailment, under which the plaintiff concededly stands in the shoes of the bailor under the doctrine of subrogation; and the defendant having admitted the receipt of the automobile and his inability to return it, a prima facie breach of the contract was established, to meet which it devolved upon the defendant to prove that he exercised ordinary care in keeping the machine, and such as the nature of the bailment required him to exercise. Davis v. Tribune Co. 70 Minn. 95, 72 N. W. 808; Wickstrom v. Swanson, 107 Minn. 482, 484, 120 N. W. 1090.

The defendant had the right to employ any one he chose to act as the foreman of his repair shop, but, so far as concerned third persons who delivered their property at the shop for repairs, it was his duty to exercise proper supervision; and if he had notice or knowledge—and we think it clearly appears from the evidence that he had such—

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that such employee was possessed of proclivities rendering it likely that he would injure the property of others so delivered it was his duty to exercise ordinary care to protect the same from the danger of injury to which it was thus subjected. It would be as unfair as legally untenable that the defendant should be allowed to subject the property of his innocent customers to the danger of unrequitable loss from his failure to take the ordinary and usual precautions to prevent damage by his dissolute or reckless employees.

The defendant seeks to escape the force of this rule by claiming, in his brief, that his foreman stole the machine, and that for such crime he (the defendant) cannot be held responsible. This proposition might be granted if it were sustained by the evidence; but such is not the case. There is no testimony to warrant the conclusion that Murphy intended to appropriate the machine to his own use, or to deprive the owner of his property therein; but, on the contrary, it appears that after the accomplishment of the legitimate purpose for which the car was taken out the most that was done, aside from its ultimate and accidental injury, was to use it in the course of a drunken escapade in and near the city.

And the defendant's further contention that he should not be held liable for the acts of a foreman who, at the time, was not acting in the line of his duty, nor as an employee, nor within the scope of his authority, may likewise be admittted as a general proposition; but the case is not thereby taken out of the operation of the rule stated. We think that the court correctly submitted the sole question mentioned, and that the jury's determination thereupon should not be disturbed.

2. The defendant claims that the complaint states no cause of action. This point was not made on the trial, and cannot here be sustained; for it is too late to urge the deficiencies, if any, claimed. 2 Dunnell, Minn. Dig. § 7726.

3. The fatal variance between the allegations of the complaint and the proofs is urged. As we understand the contention on this point, it is that the allegation was that the damage occurred "while said car was in the possession of said defendant," and the testimony "showed that the car was not in the possession of the defendant at the

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time the damage was done, but that the same was stolen from the possession of the defendant by a servant, and damaged while in the servant's possession," and that therefore there was a fatal variance. This contention is without merit. The facts in issue were, it appears, known to the defendant; and it is clear that if there was a variance—which we think was not the case—the defendant was in no wise misled. R. L. 1905, § 4158.

4. The defendant claims that the court erred in denying him the right to introduce evidence tending to show the value of the car at the time of the accident. We think, however, that it is too plain to justify discussion that the defendant was estopped by his conduct in acting virtually as appraiser between the insurer and the insured in determining the intrinsic value of the car at the time of its injury.

7. Nor do we find any merit in the defendant's claim of error in the court's refusal to strike out testimony, nor in allowing the amendment of the complaint; the latter contention being, in any event, error without prejudice, under our holding that the complaint stated a cause of action.

Order affirmed.

GERTRUDE O'CONNOR v. GREAT NORTHERN RAILWAY COMPANY.[1]

January 24, 1913.

Nos. 17,859—(162).

Former decision followed.

The former decision upon an appeal from an order denying a motion for judgment notwithstanding the verdict or for a new trial is the law of the case upon an appeal on the same record from a judgment entered since the former appeal. [Reporter.]

Carrier — limitation of liability.

A carrier, by a fair, open, just and reasonable agreement may limit the

[1] Reported in 139 N. W. 618.

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amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. [Reporter.]

Remedy governed by Federal law.

Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. ed. —, and subsequent cases hold that, when such a contract is made out, its enforceability is determined not by the local law but by Federal law. A provision of a state constitution or statute making such contracts void, or a decision of a state court that they are against public policy, is not controlling. [Reporter.]

After the former appeal reported in 118 Minn. 223, 136 N. W. 743, judgment was entered in favor of plaintiff in the district court for Ramsey county. From the judgment entered, defendant appealed. Affirmed.

W. L. Clift, for appellant

James Mattimore and *T. P. McNamara,* for respondent.

Per Curiam.

This case was before this court at the last term on appeal from an order denying an alternative motion for judgment notwithstanding the verdict, or for a new trial. O'Connor v. Great Northern Ry. Co. 118 Minn. 223, 136 N. W. 743. The decision there made recognized the rule that a contract fairly made, fixing a value upon goods shipped at less than the true value, for the purpose of obtaining a lower freight rate and limiting the recovery in case of loss to the amount so fixed, is valid and binding. It was held, however, that under the evidence disclosed the question whether such a contract was fairly made was one of fact, and that the finding of the jury that no such contract was in fact made was sustained. The case is before us now on the same record on appeal from the judgment since entered. The former decision is the law of the case, and is controlling here.

It is urged that the decision of the United States Supreme Court in Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. —, Chicago, B. & Q. Ry. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. ed. —, and Chicago, St. P. M. & O. Ry. Co. v. Latta,

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226 U. S. 519, 33 Sup. Ct. 155, 57 L. ed. —, just decided, make the alleged contract in this case a binding contract as a matter of law.

We do not so understand these decisions. The existence of such a contract was not in controversy in any of these cases. These decisions do not decide that the transactions here disclosed make, as a matter of law, an unimpeachable contract. What they hold is that, when such a contract is made out, its enforceability is determined, not by the local law of the state, but by Federal law, so that a provision of a state constitution or statute making such contracts void, or the decision of a state court that such contracts are against public policy, is not controlling. In Adams Express Co. v. Croninger, supra, Justice Lurton states the common-law rule adopted by the Federal Supreme Court as follows:

"It has therefore become an established rule of the common law as declared by this court in many cases, that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk."

In speaking of the effect of the acts of Congress, the court further says:

"The statutory liability, aside from the responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law, as that body of law applicable to carriers has been interpreted by this court, as well as many of the states."

We conceive that the effect of these decisions is simply to make the common-law rule, as it is above declared, the uniform rule throughout the United States. This rule has been recognized in this state for many years. Alair v. Northern P. Ry. Co. 53 Minn. 160, 54 N. W. 1072, 19 L.R.A. 764, 39 Am. St. 588, brief. The decision

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on the former appeal is merely an application of the rule to the facts of this case.

Judgment affirmed.

FIRST NATIONAL BANK OF GOODHUE v. VILLAGE OF GOODHUE.[1]

January 24, 1913.

Nos. 17,888—(153).

Municipal contract — recovery of money.

Where a municipal corporation receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, which contract was entered into in good faith and without purpose to violate or evade the law, but for the failure to comply with the requirements of statutes made essential to a valid contract was illegal and void, and the money or property so received is retained and subsequently devoted to legitimate municipal purposes, the municipality is liable therefor, and recovery may be had against it as upon an implied contract.

Same.

Where a bank in good faith loans money to a municipal corporation for a legitimate corporate purpose, and the money so loaned is paid into the municipal treasury and subsequently expended for the purpose stated, recovery may be had against the municipality for a return of the money, though the contract was void because the president of the municipal council was also a managing officer of the bank, and participated in the council proceedings by which the loan was authorized.

Action in the district court for Goodhue county to recover $2,800 upon two causes of action. The complaint alleged that defendant, representing to plaintiff and plaintiff in good faith believing that

[1] Reported in 139 N. W. 599.

Note.—As to the liabilty of municipality or other public corporation on implied contract, see notes in 27 L.R.A.(N.S.) 1117 and 41 L.R.A.(N.S.) 473.

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the money was to be used by defendant village for legitimate and proper municipal uses, borrowed money, averred that the same was used for village purposes, set out the warrants mentioned in the opinion, and alleged that they were issued without authority of law but were brought into court to be surrendered.

The answer among other matters alleged that the person who signed the warrants mentioned in the complaint as president of the council was an officer and president of the plaintiff, and as president of the village council was prohibited by law from procuring any loan of money from plaintiff for defendant and prohibited from loaning any money to defendant; that he was guilty of a crime in being interested in obtaining such pretended loan or in entering into any contract for the loan, and plaintiff was forbidden to loan any such money to defendant, all of which was well known to plaintiff and its officers at the time of such pretended loans and of such warrants. The answer also averred that the officers of defendant village by the laws of the state were prohibited, without first obtaining authority so to do from five-eighths of the legal voters, voting at a special or general election for the purpose, to incur any indebtedness or borrow any money; that the voters of the village were never given an opportunity to approve or reject the incurring of the indebtedness or loans, and no election was held for that purpose, although a large number of such voters to the knowledge of plaintiff requested the village council and its president to submit the question to the voters before such loans were made.

The reply alleged that the person named as president of the village council had no interest in the construction of the fire hall and jail for defendant, in no manner influenced any of his fellow members of the council to borrow money, and acted solely therein as directed by the council and was not in any manner directly or indirectly connected with the plaintiff at the time of the second loan.

The case was tried before Hodgson, J., who made findings and ordered judgment in favor of plaintiff. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

Mohn & Mohn, for appellant.

F. M. Wilson, for respondent.

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BROWN, C. J.

Plaintiff is a banking corporation organized and existing under the laws of the United States, the defendant a municipal corporation duly organized under the general laws of this state. In October, 1909, defendant, through its common council by proper action taken, determined to purchase a site for and erect thereon a fire and jail building for the use of the village. The village was without funds available for the purpose, and on October 9, 1909, the council by resolution directed the president of the council and village clerk to borrow from plaintiff the sum of $1,000, and to issue therefor a village warrant for its repayment. That sum of money was insufficient to complete the building, and the council in November of the same year authorized a second loan of $1,800. Plaintiff paid the total amount to the village treasurer, and the whole thereof was subsequently used and expended in the purchase of the site and the erection of the building thereon. The trial court found that plaintiff loaned the money to the village in good faith, and that the same was expended as just stated. Both transactions were illegal and void for the reason that the village council was not authorized to make such a loan of money without first submitting the question to the legal voters for their approval. The question was not so submitted as to either loan. The first loan was illegal and void for the further reason that the president of the village council, who as such participated in the transaction, was also a managing officer of plaintiff bank, and was prohibited by law from entering into any contract with the village in which his bank was interested. Section 731, R. L. 1905.

Plaintiff brought this action to recover the amount so loaned, having first demanded repayment, on the ground of money had and received. Plaintiff conceded in its complaint the invalidity of the warrants, and they were brought into court for the use of defendant, and the action is predicated, not upon the contract, but upon the alleged implied obligation of the village to repay the money. The trial court ordered judgment for plaintiff, and defendant appealed from an order denying a new trial.

The only question presented is whether, on the facts stated, which are not in dispute, an action will lie for money had and received; or,

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as otherwise expressed, whether a municipal corporation is liable in assumpsit upon an implied contract to pay for what it has received, where the express contract pursuant to which it received the same is invalid because of the failure of its officers to comply with statutory requirements.

1. The courts are in full harmony in holding that one who deals with a municipal corporation in respect to a matter beyond its corporate powers can have no relief either in law or in equity. Contracts so entered into are wholly void, because prohibited, of which all are required to take notice. But there is a sharp conflict in the adjudicated cases upon the question of liability where the corporation is vested with power to enter into a particular contract, and its invalidity arises solely from the failure to comply with essential requirements of law. In such cases many courts of high standing hold that the municipality may be compelled to do justice, and recovery is allowed as upon an implied contract to pay for what it has received. Ingersoll, Public Corporations, 297; Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; Marsh v. Fulton Co. 10 Wall. 676, 19 L. ed. 1040; Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238; Argenti v. San Francisco, 16 Cal. 256; Pimental v. San Francisco, 21 Cal. 352; Gause v. City (C. C.) 1 Fed. 353; Thomson v. Town, 109 Wis. 589, 85 N. W. 425; Luther v. Wheeler, 73 S. C. 83, 52 S. E. 874, 4 L.R.A.(N.S.) 746, 6 An. Cas. 754; Long v. Borough of Lemoyne, 222 Pa. St. 311, 71 Atl. 211, 21 L.R.A.(N.S.) 474. In short, the "doctrines of assumpsit are applicable to municipalities as well as to natural persons, and the action may be maintained on any of the common counts, 'not from any contract entered into on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial.'" Ingersoll, Public Corporations, 299.

The rule stated has often been applied in cases of borrowed money, where the money has been paid into the municipal treasury, and subsequently expended for legitimate municipal purposes. Fernald v. Gilman (C. C.) 123 Fed. 797, and authorities cited in Ingersoll, Public Corporations, supra.

The opposite view of the question proceeds upon the theory that to

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permit a recovery in such cases results for all practical purposes to upholding the invalid contract, thus enabling the municipality to do indirectly that which it could not do directly. The courts so holding apply the doctrine of ultra vires strictly, and refuse relief where the contract was entered into irregularly or in violation of law, as well as where the subject-matter was beyond the power of the corporation. The question on facts precisely like those here disclosed has never been presented to this court, though in analogous cases the tendency of our later decisions has been in harmony with the rule of liability applied by the authorities cited.

In this case the money was loaned to the municipality by plaintiff in good faith, it was paid into the village treasury, and subsequently expended for a purpose authorized by law. The forms of law were not complied with in effecting the loan, and the contract was invalid for that reason. Yet the village received the money, and ought in equity and good conscience to return it. And, though we have held that the doctrine of ultra vires is applied to municipal corporations with greater strictness than to private corporations, the doctrine really has no application to the case. If the question was whether the contract was valid, the decision necessarily would be that it was not. This action proceeds upon that theory. In that view the express contract disappears, because unauthorized and the rule of implied liability takes its place.

We are unable to assign a good reason for differentiating between the private and the municipal corporations as respects the rule of justice and common honesty. The private corporation in a case of this kind would not be heard to dispute its liability, nor should a public corporation be permitted to do so where, as in the case at bar, there is no question of fraud or collusion, and no concerted purpose between the village officers and plaintiff intentionally to evade or violate the law.

A situation of that kind would present a question of fraud, and, both parties being participants, the courts would probably decline to aid either. The finding of good faith in this case negatives any such situation. Though defendant at one stage of the trial offered some evidence tending to show that the question whether the loan

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could probably be made without a favorable vote of the people was brought before the council, yet the evidence offered fell short of disclosing a fraudulent purpose intentionally to evade the law, and the ruling of the court excluding it is not assigned as error. So that whether such a purpose participated in by both parties, the city authorities and the other contracting party, would present a case of nonliability, we need not determine.

As heretofore stated, our later decisions on principle sustain the rule of liability on facts like those here presented. Farmer v. City of St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L.R.A. 199; Village of Pillager v. Hewett, 98 Minn. 265, 107 N. W. 815; Borough of Henderson v. County of Sibley, 28 Minn. 515, 11 N. W. 91; Laird Norton Yards v. City of Rochester, 117 Minn. 114, 134 N. W. 644; White v. City of Chatfield, 116 Minn. 371, 133 N. W. 962. We follow and apply the rule adopted in these cases, and hold, on the facts found by the trial court, defendant liable as upon an implied promise to repay the money. The case is distinguished from Young v. School District, 54 Minn. 385, 55 N. W. 1112, 40 Am. St. 340, for the reason given in Kreatz v. St. Cloud School District, 79 Minn. 14, 81 N. W. 533.

2. The fact that the first loan in the case at bar was void for the additional reason that an officer of plaintiff was also a member of the village council furnishes, in our judgment, no sufficient reason for differentiating that form of illegality from that of a failure to submit the question to popular vote. The difference between the two situations is one of degree, and the rule ought to apply equally to both. The foundation of the rule is found in the fact that the municipality has received money or property for a legitimate municipal purpose for which equity and good conscience require payment. Currie v. School-District, 35 Minn. 163, 27 N. W. 922; Diver v. Bank, 126 Iowa, 691, 102 N. W. 542, 3 An. Cas. 669; Kagy v. School District, 117 Iowa, 694, 89 N. W. 972; Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242; Mayer v. Huff, 60 Ga. 221. The courts are divided upon this question. Note to 27 L.R.A.(N.S.) 1117.

The case of Stone v. Bevans, 88 Minn. 127, 92 N. W. 520, 97 Am.

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St. 506, involved services rendered, and is not here in point, though some of the courts uphold the right of recovery even in that class of cases. 27 L.R.A.(N.S.) supra.

Order affirmed.

F. W. GEISS v. TWIN CITY TAXICAB COMPANY.[1]

January 24, 1913.

Nos. 17,889—(163).

Negligence of servant.

Where a servant, without authority from the master, permits a stranger to assist him in his work for the master, and such stranger, in the presence of the servant and with his consent, negligently does such work, the master is liable for such negligence.

Conduct of counsel.

Remarks of counsel to the jury *held* not improper.

Damages.

The damages were not excessive.

Action in the district court for Ramsey county to recover $5,000 for personal injury. The facts are stated in the opinion. The complaint alleged that, in repairing a certain automobile left with defendant for repairs, it was necessary for defendant to take it from its repair shop and use, operate and try out same upon the streets of the city, and accordingly, in process of repairing the automobile, defendant operated it upon the public streets of the city negligently and at a negligent, unlawful and high rate of speed against plaintiff, whereby his leg was broken and he was so seriously injured it was

[1] Reported in 139 N. W. 611.

Note.—On the question of the liability of master for injury to property or person of one to whom he owes no contractual duty, by acts of volunteer whom servant permits to assist in performance of master's service, see note in 13 L.R.A. (N.S.) 572.

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necessary to remove him to one of the hospitals of the city for treatment. The answer denied the allegations in the complaint. The case was tried before Dickson, J., who, at the close of plaintiff's case, denied defendant's motion to dismiss on the grounds that the plaintiff had not proved a cause of action, that the evidence did not show negligence, that it did not show at the time the machine was operated by servants of defendant who were executing their master's business, and a jury which returned a verdict in favor of plaintiff for $1,200. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Henry W. Volk, for appellant.

Allen & Straight, for respondent.

BUNN, J.

This is an action to recover for personal injuries received by plaintiff in being struck by an automobile. The verdict was for plaintiff in the sum of $1,200, and defendant appeals from an order denying its motion in the alternative for judgment notwithstanding the verdict or for a new trial.

It is conceded on this appeal that the evidence was sufficient to sustain the verdict on the question whether the accident was caused by negligence on the part of the person who was operating the automobile. The principal contention is that defendant is not liable for the negligence of this driver, or chauffeur. The facts bearing upon this question are these:

Defendant was in the business of operating taxicabs in St. Paul, and also repaired automobiles for others. On the day of the accident Connolly and Hildebrand, two employees of defendant, had completed repairs on a car belonging to one Printon, and pursuant to custom took the car out on the street preparatory to "trying it out," to ascertain if it had been properly repaired. Defendant's foreman was present when the two men had the car on the street in front of defendant's garage, and instructed them to go to a repair supply shop, while they were operating the car, and procure a piece of pipe to be used in repair work. At this time one Vielleux, who was a tax-

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icab driver in defendant's employ, came to the garage to take out the taxicab which he drove, but this cab had not yet returned to the garage. Connolly and Hildebrand were in the front seat of the repaired automobile, and in the presence of the foreman and with his acquiescence Vielleux got into the rear seat and the automobile went off, with Connolly at the wheel. They stopped at a repair supply shop, and, while Connolly went in for the pipe, Vielleux climbed into his seat and took the wheel. When Connolly came out, he got into the rear seat, and, Vielleux driving, they proceeded to other repair supply shops for the pipe, which they failed to find. It was then suggested that they test the car on the Sixth street hill, and they drove up Sixth street with this object in view; Vielleux operating the wheel, Hildebrand sitting in the front seat beside him, and Connolly in the rear seat. While approaching the hill at a high rate of speed, the car struck plaintiff and inflicted the injuries complained of. As before stated, there is no question here as to the negligent operation of the car, nor is there any suggestion that plaintiff was guilty of contributory negligence.

The evidence was clearly sufficient to justify a finding that Connolly and Hildebrand were trying out the car at the time of the accident, and that they were authorized by defendant to do so. Clearly, therefore, if the accident had happened through the negligence of either of these servants, defendant would be responsible. The claim is that Vielleux, through whose reckless driving the accident happened, was not employed or authorized by defendant to drive the car, and therefore that the rule of respondeat superior does not apply. The facts are most peculiar. Vielleux was a servant of defendant, but he was only employed to drive a taxicab, and was not directly authorized by defendant to try out this car. But defendant's foreman knew that Vielleux was in the automobile when it started, and he was permitted by Connolly and Hildebrand to operate it. They were present all the time, and apparently made no effort to prevent Vielleux from acting as chauffeur, or from exceeding the speed limit.

We think that defendant is responsible for the negligent operation of the car, even conceding that it had not authorized Vielleux to

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operate it, or authorized Connolly or Hildebrand to employ an assistant. We approve the rule that, when the master intrusts the performance of an act to a servant, he is liable for the negligence of one who, though not a servant of the master, in the presence of his servant and with his consent negligently does the act which was intrusted to the servant.

A clear application of this rule is found in the model opinion in Booth v. Mister, 7 C. & P. 66, where the facts were that a servant of the master, driving a cart on his master's business, intrusted the reins to a friend riding with him, who drove carelessly and caused an accident. The English judge said: "As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself."

In Althorf v. Wolfe, 22 N. Y. 355, the master had instructed his servant, Fagen, to remove snow and ice from the roof of a house. Fagen procured his friend Cashman to assist, and Cashman negligently threw ice and snow on a person passing by, who was killed. It was held that the master was liable.

In Dimmitt v. Hannibal, 40 Mo. App. 654, a boy who was not employed by defendant, but who had performed voluntary services about a station, threw a switch with the consent and in the presence of a brakeman, whose duty this was, but without his direction. It was held that the company was liable to a passenger injured as a result.

The cases are collected in the note to Thyssen v. Davenport, 13 L.R.A.(N.S.) 572. We think they support the conclusion that the master is liable when the act is done in the presence of the servant and by his direction, or with his acquiescence, though the person doing the act is not a servant of the master, and though the master has not authorized his servant to employ an assistant. It is generally stated, as in Althorf v. Wolfe, that the act of the stranger is substantially the act of the servant; the stranger being considered an instrumentality in the hands of the servant. In many cases the liability is placed upon the ground of the servant's negligence in permitting another to perform his duties in a negligent manner.

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The case of Haluptzok v. Great Northern Ry. Co. 55 Minn. 446, 57 N. W. 144, 26 L.R.A. 739, is relied on by defendant, but this decision, conceding it to be sound, is based upon vitally different facts, and is not controlling here. In the case cited a station agent of the company had employed a young man to render general services about the station in return for the use of the office and telegraph instruments in learning to become a telegraph operator. In handling a truck on the platform, the young man carelessly ran against a child. The agent was not present, and had given no specific directions that the work be done, although it was in line with work that the assistant had been doing about the station with the agent's consent. The court sustained a verdict for plaintiff, on the ground that there was evidence that the agent had implied authority to employ an assistant, but announced the doctrine that, in the absence of express or implied authority in the servant to employ an assistant, the master is not liable for the negligence of such assistant. Justice Mitchell distinguishes Booth v. Mister, supra, and Althorf v. Wolfe, and calls the decision in the latter case "very unsatisfactory," because it is difficult to ascertain the precise ground upon which it was decided.

We have no disposition to question the soundness of the rule that under the doctrine of respondeat superior a master is not, generally speaking, responsible for the negligence of another, not his servant, or the application of this doctrine to a case where the negligent act is done by one without authority employed by the servant to assist him, and not done in the presence of the servant and with his consent. But where the servant is present, and consents to the performance of the act by the assistant in a negligent manner, we think the negligence is that of the servant, and that the master is responsible.

The facts in the case at bar are much stronger for the plaintiff than those in any of the cases cited, and are sufficient to sustain the liability of defendant under any rule. Vielleux was defendant's servant, though he was not employed by defendant to test cars that had been repaired, or to drive this particular car. He was, however, an experienced chauffeur, a driver of a taxicab for defendant. Defendant's foreman saw him ride off in the car with the two men who were

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directed to test it. The latter permitted Vielleux to take the driver's seat and operate the car. These facts sufficiently show negligence on the part of Connolly and Hildebrand in abandoning the duty imposed upon them by the master, and bring the case under the doctrine applied in Setterstrom v. Brainerd & N. M. Ry. Co. 89 Minn. 262, 94 N. W. 882, which, indeed, seems really to be not different from the rule of Booth v. Mister and Althorf v. Wolfe. And we do not intimate that, under the peculiar facts of the instant case, the defendant would not be liable without reference to negligence on the part of Connolly or Hildebrand, on the ground that Vielleux was its servant and impliedly authorized to operate the car.

We find no merit in the criticisms of the remarks of plaintiff's counsel to the jury. They did not go beyond legitimate argument, and are certainly no ground for a new trial.

The amount of the verdict, while large, does not seem to us so excessive as to warrant our interference.

Order affirmed.

JAKE QUACKENBUSH v. VILLAGE OF SLAYTON.[1]

January 31, 1913.

Nos. 17,786—(155).

Notice of personal injury — statute not applicable.

In an action brought against a municipality to recover damages for personal injuries received by a person while in its employ as a servant, and by reason of its negligent failure to discharge the duties of a master, R. L. 1905, § 768, does not apply, either as to the service of written notice or as to the limitation of one year within which the action must be brought.

Limitation of action for personal injury.

Held, also, that the limitation of two years prescribed by subdivision 1 of section 4078, R. L. 1905, does not apply to actions to recover damages for personal injuries received through another's negligence.

[1] Reported in 139 N. W. 716.

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Action in the district court for Murray county to recover $30,000 for personal injury. Defendant demurred to the amended complaint on the ground that the facts stated therein did not constitute a cause of action. The demurrer was sustained, Nelson, J., with leave to plaintiff to amend the complaint. From the order sustaining the demurrer, plaintiff appealed. Reversed.

Tom Davis, Ernest A. Michel, D. L. Kennedy and *John I. Davis,* for appellant.

A. J. Daley and *M. J. Harrington,* for respondent.

HOLT, J.

The court sustained a demurrer to the complaint, and plaintiff appeals.

Plaintiff alleges that he was employed by the defendant, a duly incorporated village, as a laborer in the operation of a gas plant maintained by the defendant; that while so employed he was set to work in a place rendered unsafe through the negligence of defendant in permitting drain pipes to become clogged, by reason whereof gas accumulated and exploded, burning and injuring plaintiff. The complaint lacks directness and definiteness in the statement of the particular negligence which caused the injury, but as against a demurrer we think the allegations are sufficient to show that defendant, as master, violated its duty to provide a reasonably safe place wherein plaintiff, its servant, was set to work.

The chief contention of defendant is that the complaint fails to state a cause of action, for the reason that it is not alleged that the notice specified in section 768, R. L. 1905, was served on defendant. Since the decision of the trial court was rendered herein, we have had occasion to pass on the necessity of notice to a municipality in the case of injury to one of its servants, and have held that it is not a prerequisite to a suit. Gaughan v. City of St. Paul, 119 Minn. 63, 137 N. W. 199. The charter provision there considered is essentially the same as the above-cited section of the statute. We adhere to and follow that decision, which is also in accord with Kelly v. City of Faribault, 95 Minn. 293, 104 N. W. 231, and Pesek v. City of New Prague, 97 Minn. 171, 106 N. W. 305. In the case of Mitchell v.

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Village of Chisholm, 116 Minn. 323, 133 N. W. 804, relied on by defendant, an injury to a servant was not involved, and, as pointed out in the Gaughan case, has no bearing where the action is by a servant against the master, the municipality.

But it is contended by defendant that the limitation of one year in which an action must be commenced against a village, contained in said section 768, applies to all personal injury actions, and is not restricted to those in which notice is required to be served. We are unable to adopt that view. We hold that the limitation in the section relates to those actions only which cannot be maintained against a municipality unless notice of the injury is given as therein provided.

It is also claimed that the court properly sustained the demurrer, because more than two years elapsed between the time the cause of action accrued and the commencement of the suit. In other words, the defendant contends that this action is governed by the limitation prescribed by subdivision 1, section 4078, R. L. 1905, instead of by subdivision 5 of section 4076 thereof. The decisions of this court are to the contrary. Brown v. Village of Heron Lake, 67 Minn. 146, 69 N. W. 710; Ackerman v. Chicago, St. P. M. & O. Ry. Co. 70 Minn. 35, 72 N. W. 1134; Ott v. Great Northern Ry. Co. 70 Minn. 50, 72 N. W. 833. Sixteen years have passed since the court placed its construction on the law governing the limitation of personal injury actions, and it ought now to be adhered to, under the doctrine of stare decisis.

Order reversed.

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JOHN KOMMERSTAD v. GREAT NORTHERN RAILWAY COMPANY.[1]

January 31, 1913.

Nos. 17,827—(187).

Failure to fence track — risk assumed by section man.

Failure of a railway company to fence its track as required by statute is evidence of negligence. *Held*, however, following Fleming v. St. Paul & D. R. Co. 27 Minn. 111, that this liability is subject to such qualification as the general rules of law impose in analogous cases, and that if a section man enters and continues in such service, knowing that the road is not fenced, he assumes the risks naturally incident to such condition.

Defects in complaint — demurrer.

Where the facts from which assumption of risk arises appear from the face of the complaint, that question may be raised by demurrer.

Complaint sufficient.

The complaint in this case contains the further allegations that defendant negligently operated its trains at an excessive rate of speed and negligently failed to give proper warnings and signals, and that by reason of such negligent operation the train struck a horse upon the track and threw it against plaintiff while plaintiff was engaged in his usual work of cutting grass upon the right of way. *Held* to state a cause of action.

Proximate cause of injury.

Held, that these occurrences were not so improbable as to warrant the court in holding as a matter of law that the wrongful act was not the proximate cause of the injury.

Action in the district court for Lyon county to recover $30,000 for personal injury. The facts are stated in the opinion. The defendant demurred to the complaint for the reason that on its face it did

[1] Reported in 139 N. W. 713.

Note.—As to the obligation of railroad company to employees as to fencing track, see note in 25 L.R.A. 320.

On the question of the assumption of obvious risks of hazardous employment, see note in 1 L.R.A.(N.S.) 272.

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not state facts sufficient to constitute a cause of action. The demurrer was overruled, Olsen, J. From the order overruling the demurrer, defendant appealed. Affirmed.

Winsor & Keith and *M. L. Countryman,* for appellant.

Tom Davis, Ernest A. Michel, D. L. Kennedy and *John I. Davis,* for respondent.

HALLAM, J.

This is an appeal from an order overruling a demurrer to plaintiff's complaint. Plaintiff alleges that he was in the employ of the defendant as a section man cutting grass upon defendant's right of way; that defendant failed to fence its track as required by law; that by reason thereof a horse strayed upon the track near where plaintiff was employed; that while on the track it was struck by a train of defendant and thrown against plaintiff. It is further alleged "that said defendant negligently, recklessly, and carelessly ran said train at a high and dangerous rate of speed; * * * that said defendant negligently, recklessly and carelessly failed and neglected to give any warning whatsoever of the approach of said train, and that said defendant gave no signal whatsoever to keep or frighten the said horse from said tracks of said defendant, and that said defendant negligently ran said engine into and against said horse, and that by reason of the failure of said defendant to provide good and substantial fences on each side of its track at the point aforesaid, and by reason of the negligent operation of said train, and by reason of the failure of defendant to give warning of the approach of said train, and by reason of the excessive and unlawful rate of speed at which said train was run, and the negligent manner in which said train was run, said horse was struck and thrown upon and against plaintiff."

Defendant demurred on the ground that the complaint failed to state a cause of action. Two grounds of negligence are here alleged: First, the failure of defendant to fence its track as required by statute; second, the negligent operation of train. If the first ground alone were involved, the demurrer would be well taken. The statutes of this state provide that every railroad company shall maintain a

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good and substantial fence on each side of its line of road, and that any company failing to comply with such requirements shall be liable for all damages resulting therefrom. R. L. 1905, §§ 1997, 1998, as amended by chapter 309, Laws 1911.

1. It is well settled that the effect of these statutes is to make a failure to fence evidence of negligence (Fleming v. St. Paul & Duluth R. Co. 27 Minn. 111, 6 N. W. 448; Ellington v. Great Northern Ry. Co. 96 Minn. 176, 104 N. W. 827), and to make the railroad company liable for all damages to person or property sustained by any person in consequence of such failure or neglect.

It is, however, equally well settled that this liability is subject to such qualification as the general rules of law impose in analogous cases; that the doctrine of assumption of risk applies as in any other case of negligence, so that if an employee enters and continues in such service, knowing that the road is not fenced, he assumes the risks naturally incident to these conditions, and in such case the employee cannot recover for an injury to his person sustained in consequence of the failure to fence. This was held in Fleming v. St. Paul & Duluth R. Co. supra, decided in 1880, and the rule has been adhered to ever since. The allegations of the complaint bring this case clearly within the rule of the Fleming case, and the decision in that case settles the rights of these parties so far as consequences of failure to fence are concerned.

2. The facts from which such assumption of risk arises appear from the face of the complaint. That question may accordingly be raised by demurrer. Some doubt was cast upon this proposition by the language of this court in Sweeney v. Poppenberger, 116 Minn. 134, 133 N. W. 474. Previous decisions of this court have, however, recognized the rule as above stated. Boyer v. Eastern Ry. Co. 87 Minn. 367, 92 N. W. 326; Manks v. Moore, 108 Minn. 284, 122 N. W. 5. We hold that the allegations of failure to fence and of the consequent injury do not state a cause of action.

But the failure of the defendant to fence the track is not the only ground of liability alleged. There are ample allegations of negligence in the operation of defendant's train.

3. It is alleged that the train was negligently operated, both in

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point of speed and in failure of signals, and that such negligent operation was one of the causes of the collision with the horse. Both excessive speed and failure to give signals may be potent causes of injury to animals upon the track. Mooers v. Northern Pacific R. Co. 69 Minn. 90, 71 N. W. 905. These allegations sufficiently allege negligence on the part of the defendant and injury to the plaintiff caused thereby. Under this branch of the complaint it is quite immaterial how the horse came to be upon the track. The gist of the action is the act of defendant in throwing the horse upon plaintiff after it came there.

4. The injury was an unusual one. There may be a question whether the injury to plaintiff was the proximate consequence of the alleged negligent operation of the train, but we believe that question to be one of fact and not of law. The rule is that a person guilty of negligence is held responsible for all the consequences which a prudent and experienced person, fully acquainted with all the circumstances which in fact existed, would at the time of the negligent act have thought reasonably possible to follow if they had occurred to his mind. And this is true whether such circumstances could have been ascertained by reasonable diligence or not. Wallin v. Eastern Ry. Co. 83 Minn. 149, 158, 86 N. W. 76, 54 L.R.A. 481. If the facts alleged in the complaint are true, a jury might fairly find that the injury to plaintiff was a proximate result of the alleged negligent operation of the train. In Griggs v. Fleckenstein, 14 Minn. 62 (81) 100 Am. Dec. 199, the defendant, by negligently managing his team, permitted it to run away on a public street. His team caused the horses of a stranger to run away, and these caused damage to plaintiff. It was held that the original wrongful act of defendant was the proximate cause of plaintiff's damage. If the wrongdoer, whether handling a train or a team, instead of causing a horse to run away and to do damage to plaintiff by running, causes him to be thrown against plaintiff, the relation of cause and effect would seem to be equally clear.

Order affirmed.

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ELIZABETH L. McELRATH v. A. McELRATH and Others.[1]

January 31, 1913.

Nos. 17,843—(169).

Service of summons — finding.

A return on a summons in a divorce suit showed valid service. A finding that the person who made the return handed a copy of the summons and complaint, inclosed in a sealed and unaddressed envelope, to the defendant, stating that he had been directed by defendant's husband to give the same to her, coupled with a finding that on the same day the defendant ascertained the contents of the summons and complaint, does not show a defective service.

Complaint sufficient after entry of judgment.

Within the rule that when a complaint, after entry of judgment, is attacked for failure to state a cause of action, every reasonable inference must be indulged in to sustain the pleading, the complaint involved in this action is *held* to have stated a good cause of action for divorce on the ground of wilful desertion.

Vacating decree of divorce — state uninterested after death of one party.

In an action to vacate a decree of divorce on the ground that it was obtained by fraud and perjury of the prevailing party, brought after the death of the party guilty of the fraud, the state is no longer a party interested, and the action becomes one involving mere property rights, governed by the ordinary equitable principles.

Statute inapplicable.

In such an action, where the fraud and perjury charged against the prevailing party does not involve the jurisdiction of the court, nor any fraud or deception by which the opposing party was misled or prevented from

[1] Reported in 139 N. W. 708.

Note.—On the question of attack upon divorce decree after death of one or both of the parties, see note in 57 L.R.A. 583.

As to the right of party obtaining or consenting to divorce to contest its validity, see note in 60 L.R.A. 294.

As to impeaching decree of divorce rendered in other state on the ground of nonresidence or domicil of person in whose favor it was granted, see note in 23 L.R.A. (N.S.) 1254.

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making a defense, but relates solely to perjury and concealment in establishing the cause of action alleged, it does not come within the purview of section 4277, R. L. 1905.

Laches.

A defendant, upon whom the summons and complaint in a divorce suit was personally served, delayed for 14 years after such service, and more than 9 years after knowledge that a decree had been entered, to apply to the court to have it vacated, but waited till after the death of the plaintiff therein. *Held*, that her long delay was not excused, either by her ill health or the alleged ignorance of the fraud and perjury practiced by the prevailing party.

Action in the district court for Meeker county by the guardian ad litem of plaintiff against the executor of the last will of W. C. McElrath, deceased, and the legatees named in that will, to vacate a judgment of that court rendered in December, 1897, dissolving the marriage contract between plaintiff and said W. C. McElrath. The facts are stated in the opinion. The case was tried before Qvale, J., who made findings, denied plaintiff any relief and ordered judgment dismissing the action. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

H. S. McMonagle and *Albert F. Foster,* for appellant.

E. P. Peterson, Jesse Van Valkenburg, Sam G. Anderson, Jr., and *C. P. Carpenter,* for respondents.

HOLT, J.

This is an appeal from a judgment dismissing an action brought by plaintiff to vacate and cancel a decree entered December 14, 1897, in the district court of Meeker county, dissolving the marriage relation theretofore existing between plaintiff and her husband, on the ground that the court was without jurisdiction to render the decree and that it was procured through the wilful perjury and deception of the husband. From the pleadings and findings the following facts appear:

In 1887 plaintiff and W. C. McElrath were married in Meeker county, Minnesota, and lived on a farm together until April, 1891,

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when plaintiff became ill and temporarily insane. She was first taken to her parents' home, distant one mile from that of her husband, in order to obtain needed care. In a few days she was sent to the insane asylum, but allowed to return to her parents after a three months' stay. She was formally discharged from the asylum in November, 1891. Thereafter she became subject to recurrent epileptic fits until January, 1895, which affected her mind to a marked degree, so that "from April, 1891 until now, she has been afflicted with confusional and transitory insanity with recurring periods of lucidity which have become more and more frequent and of longer duration, but owing to her weakened physical and mental condition she has been unable, during all the time, to be away from home and the immediate neighborhood without an attendant and she has shown a decided though intermittent tendency to mental alienation." Her removal to her parents' home, commitment to the asylum, and return to her parents were with the approval of her husband. During the first two or three years after her return from the insane hospital he frequently visited and cohabited with her at her parents' home. Thereafter his visits ceased, and in August, 1897, he instituted an action for divorce in the district court of Meeker county against her on the ground of wilful desertion. A copy of the summons and complaint were delivered to her, but she defaulted, and in December of the same year he obtained a decree dissolving the marriage. There were no children. At least as early as July, 1901, she knew that the decree had been entered. The parties continued to live within one mile of each other until January 15, 1911, when W. C. McElrath died testate.

A few months thereafter this action was brought against the legatees named in the will of McElrath to set aside the divorce decree. The court found "that the said decree of divorce was by the said McElrath obtained by and through, deceit, perjury and corruption, and by gross fraud practiced by him upon the court," but granted no relief to plaintiff.

Plaintiff contends that on the findings she is entitled to relief, first, on the ground that the divorce decree is and always was a

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nullity for want of jurisdiction, in that the summons was not served on her, and, even if it were, the complaint stated no cause of action; second, that the decree having been obtained by perjury and gross fraud on the court, it ought to be brushed aside without regard to time or consequences.

The return made by the party who served the summons in the divorce suit shows on its face legal service. The court finds as to the service that it was made by the person who made the return handing to the defendant therein, this plaintiff, at her parents' home, a copy of the summons and complaint, inclosed in a plain, sealed, and unaddressed envelope, and stating that her husband had requested him to hand the same to her. Although she immediately gave the envelope to her mother without opening it, it is found that she acquainted herself with the contents of the papers, and on the day the papers were so served upon her wrote to her husband, denying that she had deserted him, and in substance stating that the charge of desertion made by him in his complaint was wholly false and untrue. We entertain no doubt of the legal sufficiency of the service.

The complaint, after stating the residence of the plaintiff in the suit, the age of the parties, their marriage, and that there was no issue, alleged:

"That some time in the month of April, 1891, the said defendant then and there wilfully abandoned and deserted her said husband, this plaintiff, wilfully abandoning and deserting the home he had provided for her, against his wishes and without his consent, and contrary to his express desires; that said defendant has never since that time returned to this plaintiff, but has ever since continued to reside apart from him; that soon thereafter said defendant removed or caused to be removed from the home of this plaintiff all of her personal effects and belongings."

The complaint is not a model pleading, but an attack now, 14 years after judgment, comes too late if a cause of action can reasonably be spelled out of the allegations. Smith v. Dennett, 15 Minn.

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59 (81) Solomon v. Vinson, 31 Minn. 205, 17 N. W. 340; Trebby v. Simmons, 38 Minn. 508, 38 N. W. 693; Slater v. Olson, 83 Minn. 35, 85 N. W. 825; Peach v. Reed, 87 Minn. 375, 92 N. W. 229; Kubesh v. Hanson, 93 Minn. 259, 101 N. W. 73. In the last case, an action to set aside a judgment obtained by default in justice court on the grounds that there was no service of summons and that the complaint did not state a cause of action, this court, speaking through Chief Justice Start, says:

"A judgment is never void for error, if the court has jurisdiction over the person of the defendant and the subject-matter of the action. Therefore defects in the pleadings in a civil action—for example, the failure of the complaint to state facts constituting a cause of action—do not render a judgment void. It is valid unless reversed or set aside on appeal or by some other appropriate proceeding in the action. An independent action in equity to set aside a judgment cannot be resorted to as a substitute for a demurrer to a defective pleading. 1 Freeman on Judgments, § 135; 17 Am. & Eng. Enc. (2d ed.) 1069."

It must be admitted that in this divorce suit the wilful desertion of the defendant in April, 1891, was alleged with legal accuracy. The contention is that the subsequent allegations do not show that the wilful desertion continued up to the commencement of the suit, and that, conceding that the leaving her husband's home was a wilful intention to desert, the desertion could immediately be terminated by the parties, as in fact was done, for by mutual consent the wife was to remain with her parents to receive needed care. But we are of opinion that it is fairly inferable from the allegations that the pleader intended to charge a continuous wilful desertion from April, 1891, up to the institution of the suit.

Plaintiff also contends that the findings bring her within the provision of R. L. 1905, § 4277. As that section has been construed, it does not apply to the fraud and perjury whereby the issues tendered by the pleadings are established at the trial. Hass v. Billings, 42 Minn. 63, 43 N. W. 797; Colby v. Colby, 59 Minn. 432,

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61 N. W. 460, 50 Am. St. 420; Id. 64 Minn. 549, 67 N. W. 663; Bisseberg v. Ree, 99 Minn. 481, 109 N. W. 1115; Hayward v. Larrabee, 106 Minn. 210, 118 N. W. 795, 130 Am. St. 606; Major v. Leonard, 115 Minn. 439, 132 N. W. 915. It is quite clear that no perjury occurred, except at the trial, and that was in establishing the issue pleaded. No fraud was attempted by the husband, by way of misleading the wife or inducing her to refrain from defending. We do not think that the mere fact of knowingly beginning an unfounded action is such a fraud upon the court that a judgment rendered therein must be set aside under the statute quoted as one obtained by means of "any fraudulent act, practice, or representation of the prevailing party." However, even if it be admitted that the facts found bring the case within the section cited, it is governed nevertheless by equitable principles, and the right to have a judgment vacated because of the fraudulent practices of the prevailing party is not an absolute one. Geisberg v. O'Laughlin, 88 Minn. 431, 93 N. W. 310.

But it is urged that in vindication of its own honor and integrity the court must purge its records of judgments and decrees obtained through practices such as herein found, no matter at what time it is apprised thereof, and it is said this is especially true in divorce suits, wherein the state is so vitally interested. It is often said that in every divorce action the state is the third party, whose rights the court must zealously protect. The welfare of the nation depends in a great measure on the stability and permanency of the marriage relation. We also grant that upon an application to vacate a decree of divorce, because wrongfully obtained, where such vacation results in reinstating the marriage, the court should be equally solicitous in promoting the interest of the state. But where the court is not invited to act until the marriage in question is irrevocably dissolved by a power beyond the control of any court of justice, we have a different situation. Such is the present case—a mere property controversy, based on the existence or nonexistence of a valid divorce decree. Therefore the equitable principles which ordinarily rule property rights should be applied.

True, there is much in plaintiff's case which strongly inclines a

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court in her favor. Her long-continued mental and physical illness, aggravated by the apparent heartless conduct of the husband in abandoning her when an affliction came upon her which called for his most considerate care and tenderest attention, would incline a court to go to the limit in granting relief. But there is also another side which cannot be overlooked. The husband was dead before this attack was made upon him. He had no opportunity to deny or explain what is now laid at his door. Plaintiff and her parents lived for 14 years within a mile of his home, and all the time knew that he had brought the suit, and for at least 10 years knew that he had obtained a decree. Apparently both she and her parents were satisfied to have the decree stand as valid. There was no desire on plaintiff's part to again assume marital relations with W. C. McElrath. She let the decree serve as a protection to her heirs, if she should die first owning property. When, however, he happened to die first, then at once she wants the decree set aside, so as to inherit all property left by him.

Although the finding is that it does not appear that plaintiff ever ascertained the exact perjured testimony by means of which the decree was obtained, or to what extent the true situation was concealed from the court who tried the divorce suit, still we may not shut our eyes to the fact that plaintiff and her parents knew and appreciated that the allegations in the complaint were false, and that necessarily perjury and deception would have to be used in order to obtain a divorce.

We have found no case holding that a spouse, with knowledge that the other, through fraud or perjury, not going to the jurisdiction of the court, has obtained a decree of divorce, may sit idly by for years, until the death of the one guilty of fraud, and then successfully invoke the equity powers of the court to secure property rights. When the spouse wronged by the decree, or any one claiming under such an one, comes into court asking relief, so that property may be reached, it must be done within a reasonable time after knowledge of the fraud, or of facts from which a person of ordinary prudence would proceed to ascertain the true state of affairs. The application in Olmstead v. Olmstead, 41 Minn. 297, 43 N. W. 67, was

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seasonably made, so in Colby v. Colby, 59 Minn. 432, 61 N. W. 460, 50 Am. St. 420, and 64 Minn. 549, 67 N. W. 663. The same rule we gather from the cases cited in the extensive notes to Lawrence v. Nelson in 57 L.R.A. 583.

In Sammons v. Pike, 108 Minn. 291, 120 N. W. 540, 122 N. W. 168, 23 L.R.A.(N.S.) 1254, 133 Am. St. 425, the majority opinion concedes the law to be in effect that, where a decree of divorce is voidable because of fraud, the victim of the fraud, may, by unexplained delay lasting until after the death of the perpetrator of the fraud, or by other conduct operating by way of waiver or estoppel, be prevented from asserting a right to the distributive share of the property left by the wrongdoer, but holds that, where a decree is rendered by a court without jurisdiction, it is a nullity, and may be attacked either collaterally or directly at any time. It is, however, to be noted that the present Chief Justice dissented, in which dissent Chief Justice Start joined, being of the opinion that long acquiescence by a party to a divorce decree valid on its face, though void in fact, would prevent the assertion of property rights based on the existence of the marriage relation after the rendition of the decree.

The case of Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831, is quoted with approval in the majority opinion in Sammons v. Pike, supra, where nine years' unexcused delay was held fatal to the right to vacate a divorce decree. In Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082, a delay of less than 2½ years after knowledge of the divorce was held a bar to the right to have a decree vacated for fraud. So in Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223, where the proceeding to vacate was instituted during the life of both, the court held that a lapse of 4 years after the plaintiff had been fully informed of the alleged fraudulent decree showed laches which prevented redress. The court says: "A court that has been imposed on by a party, who has obtained its decree in his favor by fraud and imposition, will not be slow to vindicate the administration of justice by setting aside a decree so obtained, provided the injured party is diligent in invoking its aid in that behalf." Earle v. Earle, 91 Ind. 27.

In the divorce suit here in question the court acquired jurisdiction

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of the parties, and had undoubted jurisdiction of the subject-matter of the suit, the marriage status of the parties. It is clear that the decree cannot be collaterally attacked. It cannot be treated as a nullity. At most it is voidable. We have found no authority for the proposition that one who was personally served with summons in a divorce case, one who then knew that the ground alleged for divorce was false, and must have known that a decree could not be obtained, except by concealment and perjury, can after the lapse of 14 years ask the court to vacate the same, and this in view of the fact that for more than 9 years after knowledge of its existence she made no effort to have it vacated, nor in any manner claimed the rights of a wife against her former husband until after his death. During all this time both lived in the immediate vicinity of each other. No disposition has ever been evinced by either plaintiff or her parents to protect the marriage relation of plaintiff with W. C. McElrath while he lived, and while the state also was interested in that relation, and it seems too late now, after the lapse of these many years, to invoke the aid of a court of equity in order to obtain the property which for 14 years the plaintiff permitted her former husband to consider and treat as forever freed from any claim which might be asserted thereto by or through her. Her state of mind, unfortunate as it is as shown by the findings, cannot excuse this long delay. We think the learned trial court directed the proper judgment.

Judgment affirmed.

GEOFFREY BURKE v. CHRISTOPHER ASH and Another.[1]

January 31, 1913.

Nos. 17,875—(160).

Negligence of servant.

A negligent act of a servant while engaged in the ordinary work of his

[1] Reported in 139 N. W. 705.

Note.—The question whether the duty of the master to instruct or warn servants is delegable is the subject of a note in 26 L.R.A.(N.S.) 624.

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employment, which he knows or has reason to believe may expose a fellow servant to injury, is not necessarily an act of negligence for which the master is liable.

Same — when master is responsible.

To render the master responsible for such an act it should appear: (1) That it was committed by the servant in the discharge of the duties assigned him by the master; and (2) by reason of the nature of the duties so assigned, and the nature and character of the employment, that it involved in some measure the absolute duties of the master respecting the safety of the other servants, for the discharge of which the master could not relieve himself by delegating the performance to the servant.

Action in the district court for Ramsey county to recover $10,000 for personal injury. The answer alleged that, if plaintiff sustained injuries, they were caused by his want of ordinary care and that he was fully informed of the physical conditions surrounding the work in which he was engaged and assumed all the risks of injury in connection therewith. The reply denied the new matter alleged in the answer. The case was tried before Hallam, J., who, at the close of the case, denied defendants' motion for an instructed verdict on the ground that it conclusively appeared from all the evidence that, if plaintiff was injured, it was due to the negligence of a fellow servant, and that he was conversant with all the physical conditions surrounding his work and assumed the risks incident thereto. The jury returned a verdict in favor of plaintiff for $4,000. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Reversed and new trial granted.

Morton Barrows, for appellant.

Doyle & Burns, for respondent.

BROWN, C. J.

Action for personal injuries, in which plaintiff had a verdict, and defendants appealed from an order denying their alternative motion for judgment or a new trial.

Plaintiff was in the employ of defendants, and, with others similarly employed, engaged in removing sand and gravel from a pit

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on premises adjacent to the Central High School, then under construction, in the city of St. Paul. The pit was a large open pit, some 80 feet wide and 15 feet deep—"kind of a round pit"—as expressed by plaintiff on the trial. The sand and gravel were removed by means of a derrick operated by an engine some distance away. The engine was in charge of an employee whose operation thereof was guided and controlled by signals from another employee, who stood upon the bank near the pit and in view of the engineer. A "scale," so called, described in the evidence as a large, square box, would be lowered into the pit, filled with sand by plaintiff and his fellow workmen, and when the chains attached to the derrick boom were properly adjusted the employee upon the bank would give the necessary signal to the engineer, who in turn would set the engine in motion, raising the loaded scale, swing it into proper position and place, when it would be unloaded and returned to the pit.

On the occasion here complained of a scale had been loaded with sand by plaintiff and his fellow workmen, the boom chains attached thereto and made ready to be raised when, and without notice or warning to plaintiff, who was between the scale and the bank of the pit, and without a signal from the men in the pit, the employee on the bank gave the usual signal to the engineer to raise the load, who in response thereto set the machinery in motion, with the result that, when raised from the ground, the scale swung toward plaintiff, who had not been given an opportunity to get a safe distance away, and injured his leg.

Plaintiff thereafter brought this action to recover for the injury received, charging that it was occasioned by the negligence of defendants. The complaint alleges, among other things:

"That one of defendants' employees was stationed on the bank of said pit and in full view of all points and places in said pit, to render signals to the engineer in charge of said engine for the purpose of directing the movements and operations of said chains, boom, and derrick in the hoisting of said platforms or scales from said pit; that said pit was an ordinarily safe place in which to work; and said signalman was placed in position aforesaid to render

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such signals in directing the operation of said derrick and appurtenances thereto as would maintain such safety;" and, further, "and while plaintiff was in the act of hooking one of said chains to the scale, defendant by its servant, the said signalman, did carelessly and negligently by signal given the aforesaid engineer cause said scale to be suddenly hoisted from said pit without warning to said plaintiff and before having received any signal from him, as was the custom when said scale was loaded and ready to be hoisted," in consequence of which plaintiff was injured.

The trial court submitted the case to the jury upon the theory that, though the signalman was a fellow servant of plaintiff, yet if he knew, when he gave the signal to the engineer, that plaintiff was in a position of danger and likely to be injured by starting the machinery in motion, his act in giving the signal was an act of defendants, for which they were liable. The court said to the jury that defendants were not liable for the ordinary acts of the signalman, for he was a fellow servant of plaintiff; nor were defendants liable for the mere carelessness of the signalman in giving the signal without observing plaintiff and his danger, for that also would be the act of a fellow servant; "but if Edstrom [the signalman] saw and knew that plaintiff was in a position where it would endanger his safety to raise this load without giving him warning, and if the circumstances were such that ordinary care and prudence required the plaintiff be warned before movement of the load, then failure to give such warning would be negligence for which these defendants are liable." The court had previously ruled that the pleadings and evidence presented no other ground of recovery by plaintiff, and was guided in submitting the case as stated by the decisions of this court in Berneche v. Hilliard, 101 Minn. 366, 112 N. W. 392, and Anderson v. Pittsburg Coal Co. 108 Minn. 455, 467, 122 N. W. 794, 26 L.R.A.(N.S.) 624.

We are of opinion, and so hold, that the court was in error in the instruction quoted, and that no recovery can be had upon that theory of the case.

The signalman was a fellow servant of plaintiff, and the court

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below, on the evidence presented, was right in so holding. The record contains nothing to justify the conclusion that he was authorized to, or did in fact, represent the master in the discharge of any of his absolute duties to plaintiff. He testified that he was given the position of signalman by the person who employed him, but that no instructions were given relative to the duties to be performed. He was experienced in that line of work, and probably required no instructions. But, to hold the master with responsibility for his conduct, it should appear that he was, either by appointment or custom, charged with the performance of some of the personal duties of the master. He was engaged in the common employment; the signals given by him being a necessary incident to and part of the work in which all were engaged.

It is well settled that a servant, whose duty under his employment consists in giving signals, under circumstances like those here presented, is not thereby charged with the performance of the master's absolute duties, and no liability attaches to the master for a signal negligently given. 2 Labatt, Master and Servant, 607, and authorities cited.

The rule has, however, certain qualifications. If the employment be in character necessarily dangerous to the workmen, or likely to expose them to injury unless timely warned of impending danger, and thus afforded an opportunity to protect themselves, the master owes them the duty of giving the necessary warnings or signals as the situation may require. Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099; Savino v. Griffin Wheel Co., 118 Minn. 290, 136 N. W. 876. And again, when an "employee is at work in a place safe in itself, but which by virtue of some independent work done for the master's purposes becomes dangerous, unless prior warning of the impending danger be given, and when the master has required such notice to be given or has assumed to customarily give such warning through an employee, the person charged with that duty is a vice principal." Anderson v. Pittsburg Coal Co., 108 Minn. 455, 122 N. W. 794, 26 L.R.A.(N.S.) 624.

The case at bar does not come within either qualification of the rule stated, the complaint does not allege that the place of work

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was in itself dangerous, but, on the contrary, affirmatively alleges that it was ordinarily safe; nor is it alleged that the nature of the work, or the manner in which it was carried on, made the place unsafe. The place not being in itself dangerous, or made so by the character of the work, no duty to warn the employees arose as a matter of law, and there was no evidence that the signalman had been directed to give warnings or signals to the men in the pit, or to delay signaling the engineer until he had been in some manner advised by them that all was in readiness to raise the scale. There was some evidence of a custom by which the signalman waited for a word or sign from the pit, indicating that the chains had been attached and that the men were in a safe place, before signaling the engineer. But there was a conflict in the evidence upon the question, and it was not submitted to the jury. If such a custom existed, undoubtedly the men in the pit had the right to rely upon its observance for their protection, and a violation thereof by the signalman would constitute an act of negligence for which defendants would be liable. Anderson v. Coal Co. supra; Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099. The question was not submitted to the jury, and the evidence of the custom is far from conclusive in plaintiff's favor.

Since, therefore, the evidence did not, taken as a whole, present a case involving a violation of any of the master's absolute duties to plaintiff, within the rule of the cases cited, we have only to consider whether the learned trial court properly permitted a recovery upon the theory that, if the signalman knew that his act of signaling the engineer would expose plaintiff to injury, it was an act of negligence chargeable to defendants. We are unable to concur in that view of the law. In the absence of evidence showing a duty on the part of defendants to take affirmative action looking to the protection of the men in the pit, either because of the dangerous character of the work, or by a previously established custom, the signalman was a fellow servant, and the signal to the engineer a mere detail of the work.

The case of Berneche v. Hilliard, supra, when viewed in the light of the facts there before the court, does not support the view

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of the trial court. What was said in that case in reference to the act of Hood in signaling the engineer, with knowledge that to do so would endanger the safety of plaintiff, was in view of the fact that Hood was the general foreman of the work, having full charge and control thereof, and presumptively charged with the performance of all the absolute duties of the master in respect to furnishing and maintaining a reasonably safe place in which the employees under his control were engaged at work. If in that case Hood had been a servant in the common employment, and not the general foreman of the work, or otherwise charged with a performance of the master's absolute duties, his act in knowingly exposing a fellow workman to injury would have been the wrong of a fellow servant, not chargeable to the master as an act of negligence. And it was because he was the general foreman, in full charge of the work, and presumptively clothed with the master's duty to maintain the place of work in reasonable safety, that we said in the Hilliard case, in effect, that if he started the derrick in motion, with knowledge that to do so would expose employees to injury, he violated the master's duty to maintain the safety of the place of work, for which the master would be liable.

A foreman or superintendent is often reduced to the rank of a fellow servant by the character of the work performed. But a servant engaged in the common employment, and clothed by the master with no special authority or discretion, is never raised by implication of law to the position of vice principal, except in those cases where he is intrusted with work of a character which necessarily involves a performance of some of the absolute duties of the master. This is illustrated by the cases heretofore cited.

Such is not, however, the case at bar. The signalman in this case was not engaged in a work which, on the evidence presented and the view in which the case went to the jury, necessarily involved any of the nondelegable duties of the master. The signals given by him were mere details of the work, not chargeable to defendants.

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The order appealed from must therefore be reversed, but it is not a case for final judgment.

Order reversed, and new trial granted.

HALLAM, J., having tried the case in the court below, took no part.

STATE ex rel. JOHN H. SAGNESS and Another v. HAWK CREEK TELEPHONE COMPANY.[1]

January 31, 1913.

Nos. 17,900—(10).

Rural telephone company — extension to applicants.

Whether respondent, a rural telephone company, incorporated "under and pursuant to the provisions of chapter fifty-eight (58) of the Revised Laws of the State of Minnesota for the year 1905," as expressed in its articles of association, but not in fact for the purpose of pecuniary profit, but solely for the mutual benefit of the members thereof, is a public service corporation, and as such under legal obligation to afford telephone facilities over its line to all applicants, quære?

Same — refusal not arbitrary.

Conceding it to be such a corporation, it is *held*, on the facts stated in the opinion, that its refusal to serve relators was neither arbitrary nor unreasonable.

Upon the relation of John H. Sagness and P. E. Fagerlie the district court for the county of Renville granted an alternative writ of mandamus directed to the Hawk Creek Telephone Company, requiring it to install telephone instruments and telephone service in the residences of relators or show cause why they had not done so. The matter was heard upon the relation and return by Powers, J.,

[1] Reported in 139 N. W. 711.

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who made findings and ordered judgment in favor of respondent. From an order denying a new trial, relators appealed. Affirmed.

Daly & Barnard, for appellants.

J. M. Freeman, for respondent.

BROWN, C. J.

Several farmers residing near the village of Sacred Heart, in Renville county, associated together for the purpose of establishing and constructing a rural telephone line leading from the village to their homes. An incorporation was formed, "under and pursuant to the provisions of chapter fifty-eight (58) of the Revised Laws of the state of Minnesota for the year 1905," as expressed in the articles of incorporation, and the organization was completed by the election of officers to manage the affairs of the company. It was not in fact incorporated for the purpose of pecuniary profit, but solely for the benefit of the members forming the association and such others as should thereafter become members, and for the single purpose of affording them telephone communication over the line constructed.

Certain rules and regulations governing the affairs of the company and for the admission of members were duly enacted. Among other things, each of the original members of the association was required to pay into the treasury the sum of $50, in consideration of which one share of stock was issued to him. The money thus obtained was insufficient to defray the cost of constructing the line, and an additional amount of $10 was levied upon and paid by the members. The line was constructed as contemplated, with several branches, and fully equipped for service. Subsequently further regulations provided for the admission of new members, each new applicant being required to pay to the company the sum of $60, for which he was entitled to a share of stock and to be connected with the company's line. For this payment the company furnished the new members a telephone, three telephone poles, and performed the work of connecting the wires; the member furnishing all wire and doing the work of building the line up to the point of connecting with the company line.

The only revenue received by the company to defray the expense

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of keeping the line in repair is from the payments so made by the members. There are no subsequent charges for the use of the telephones or lines, except such as are imposed by the local Sacred Heart Telephone Company for switching charges; but no part thereof is for the benefit of this company.

The company constructed, with branches, what are termed in the record as "line 1," and "line 2," and by rule limited the number of subscribers upon either thereof to 15. Line 1 was, prior to the time of this controversy, occupied by that number, while line 2 has but 11 subscribers. The limitations in this respect are imposed in the interests of the service, a larger number of subscribers upon any one line having a tendency to impair the same.

Relators Fagerlie and Sagness reside in the vicinity of both lines, 1 and 2; the former being one-half mile from line 1, and 2½ miles from line 2, while the latter resides a mile from line 1 and 1¾ miles from line 2. They joined in an application to become members of the association and for telephone connection, offering to comply with all the rules and regulations of the company. They demanded that they be connected with line 1. The company refused this connection, but offered to connect them with line 2. Claiming that they had been wrongfully refused the relief demanded, relators brought this proceeding to compel compliance therewith. The trial court found the facts, substantially as here stated, but in greater detail, denied the relief prayed for, and ordered judgment of dismissal, with costs. Relators appealed from an order denying a new trial.

A number of questions are presented and discussed in the briefs, only one of which requires consideration. It may be conceded for the purpose of the case that the defendant is a public service corporation, and as such under legal obligation to supply relators with telephone service, and that the company may be compelled by mandamus to do so. Counsel for the company earnestly contends that it is not such a corporation, that it was not organized for pecuniary profit, and hence is not a public service corporation.

We do not consider or pass upon this question; for it is clear, conceding the character of the company in that respect, that relators have not shown themselves entitled to the particular relief

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demanded. They joined in a demand for connection with line 1, and refused the offer made by the company to connect them with line 2. The most relators can claim is that the company is under legal obligation to afford them facilities for telephone service equal to others similarly situated, and that they be not arbitrarily or unjustly discriminated against. 37 Cyc. 1652, and cases cited. And the sole question for consideration is whether the company, by offering to connect relators with line 2, performed its legal duty in the premises, or whether the refusal to connect with line 1 was arbitrary, unjust, or unreasonable.

We are of opinion, and so hold, that the learned trial court properly resolved the question against relators. It appears from the findings that the number of telephones now connected with line 1 are all that can receive good service therefrom, and that to attach more thereto would greatly lessen and impair the efficiency of the line. The evidence fully supports this finding. And it further appears that the sole reason for denying to relators this connection was that it would overburden the line. In view of that situation, it seems clear that the company is not open to the charge of unreasonably or arbitrarily denying to relators a service it is under any legal obligation to extend.

It also appears that three of the present subscribers upon line 1 could with a small expense be shifted to line 2, thus making room for relators. The company was under no obligation to make such a change. That was a matter resting in its judgment and discretion, having in mind the situation and relation of the parties and all facts throwing light upon the question, and it cannot be said the conclusion reached by the company was either arbitrary or unreasonable.

The cost to relators to connect with line 2 would be $70 or $80 in excess of the expense of connecting with line 1; but that fact furnishes no basis for interference by the court. The offer to connect relators with line 2, under the facts found by the court, was a full discharge of whatever legal duty the company owed relators, and they fail to show a right to the use of line 1, or an unreasonable refusal by the company to connect them therewith.

Order affirmed.

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MEL BLIED v. GEORGE F. BARNARD.[1]

January 31, 1913.

Nos. 17,952—(215).

Performance of contract.

Plaintiff sold to defendant a stock of goods in exchange for land conveyed by defendant to plaintiff. The title to the land not being perfect, defendant gave to plaintiff a bond conditioned to perfect the title within 30 days, or, if he failed to do so, to furnish a "good and sufficient bond" conditioned to perfect said title within one year from January 15, 1910; "said bond to be subject to the approval" of plaintiff and "satisfactory to him." Defendant did not perfect the title within the 30 days, but within that time tendered to plaintiff a bond conditioned to perfect the title within one year, which bond plaintiff refused to accept, and brought this action to recover the stock of goods under a chattel mortgage given thereon by defendant to secure the performance of the first bond. It is *held*, under the conditions of the first bond, defendant was obliged to perfect the title to the land within 30 days, or furnish the second bond, and that he actually perfected the title after the 30 days, but within one year, and prior to the trial, would not discharge the chattel mortgage, unless the second bond was given.

Same — time of essence of contract.

Time was of the essence of defendant's agreement to perfect title within 30 days.

Question for jury — error to submit another question.

The evidence conclusively showed that the second bond was a good and sufficient bond, but it was a question for the jury whether plaintiff was justified in refusing to accept it. It was error to submit to the jury the question whether the bond was in fact good and sufficient, and the answer of the jury that it was not is not sustained by the evidence. The special finding that plaintiff was justified in refusing the bond, being probably based on the erroneous finding that the bond was not in fact good, the errors are prejudicial.

Statute inapplicable.

R. L. 1905, §§ 4523, 4524, prescribing the requirements of official bonds as to the number of sureties and their justification, have no application to bonds other than statutory official bonds.

[1] Reported in 139 N. W. 714.

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After the former appeal, reported in 116 Minn. 307, 133 N. W. 795, a new trial was had before Childress, J., and a jury which returned a verdict that plaintiff was the owner and entitled to the return of the property described in the complaint, or to the sum of $1,050, and answered the special questions submitted to them as stated in the first paragraph of the opinion. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Reversed and new trial granted.

J. A. & A. W. Sawyer, for appellant.

Larrabee & Davies and *Paul J. Thompson,* for respondent.

BUNN, J.

After the decision in this case on the former appeal, reported in 116 Minn. 307, 133 N. W. 795, the new trial ordered was had. The trial court submitted the issues to the jury, and a verdict was rendered that plaintiff was the owner and entitled to the return of the property described in the complaint, or, "in case such return cannot be had, is entitled to the sum of $1,050." The jury also returned answers to two special questions submitted to them, finding that: (1) The bond tendered by defendant to plaintiff February 12, 1910, was not "a good and sufficient bond;" and (2) plaintiff was justified in refusing to accept it. Defendant moved for judgment notwithstanding the verdict or for a new trial. The motion for judgment was denied, and the motion for a new trial denied upon condition that plaintiff consent to a reduction of the verdict to $452.18. Defendant appealed from this order.

The facts were stated in the decision on the former appeal, and need not be restated here. Defendant urges several grounds for a reversal of the order.

1. Defendant perfected the title to the Oregon land, for which plaintiff traded his stock of goods, in March, 1910, nearly a year before the first trial, and defendant's first point is that thereby the chattel mortgage, upon which plaintiff's right to recover the stock of goods depends, was discharged. But this was a month after the expiration of the 30 days' time given by the terms of the first bond. This bond provided that, in case defendant failed to perfect title in

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30 days from January 15, 1910, he might furnish "a good and sufficient bond" conditioned to perfect such title within one year, "said bond to be subject to the approval of Mel Blied and satisfactory to him." We certainly did not intend to hold or intimate in the former opinion that, if defendant had perfected title before the trial, the rights of plaintiff under the chattel mortgage were lost, irrespective of the question of whether defendant furnished a good and sufficient bond to perfect such title within one year. It is clear from the terms of the first bond that, if title was not perfected in 30 days, the second bond must be given, and that, unless so given, plaintiff would have the right to foreclose the chattel mortgage. It follows that defendant was not entitled to prevail on the ground alone that he in fact perfected the title.

2. The second contention of defendant is that time was not of the essence of the contract by which defendant agreed to perfect title in 30 days, and that, having perfected title within a reasonable time thereafter, the chattel mortgage was discharged. We cannot sustain this contention. While there is no express language making time of the essence, it is apparent from the language of the first bond, and from the subject-matter of the deal between the parties, that it was the intention to require defendant to give a good title, in exchange for the stock of goods, in 30 days, or to give another bond. Defendant could relieve himself from the default by giving the second bond, and it would be adding a term to the contract to hold that he need not give this bond, if he perfected his title within a reasonable time after the 30 days. It is apparent that defendant understood that it was necessary to perfect title in 30 days or give a second bond, as he did give the bond.

3. There was really but one question to be submitted to the jury: Was plaintiff justified in refusing to accept the bond? Of course, if it was not a good and sufficient bond, he was clearly justified in refusing it, and even if it was in fact good and sufficient, yet if plaintiff had reasonable grounds for believing it might for any reason prove insufficient as security to him, he was justified in refusing to accept it. We are obliged to hold that the evidence is conclusive that the bond was in fact "good and sufficient." The surety, Emily

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J. Barnard, owned unincumbered real estate in Minnesota of the value of at least $7,500. That she was the only surety, or that she was related to the principals of the bond, in no way affected the validity of the instrument or its character as a legally "good and sufficient" obligation. But under the agreement that the bond should be "subject to the approval of Mel Blied and satisfactory to him," the facts above referred to might be good reason for refusing the bond, if they furnished plaintiff reasonable grounds for believing that it might prove to be inadequate security.

We held on the former appeal that plaintiff was not entitled to refuse the bond without cause or arbitrarily, and that such refusal must be in good faith and upon some ground other than mere sentiment or suspicion. Under this holding, we think the evidence made a case for the jury on the question whether plaintiff was justified in refusing the bond. The fact that the single surety was defendant's mother, and the evidence tending to show some effort on the part of plaintiff and his attorneys to ascertain the financial responsibility of the surety, prevent our saying as a matter of law that plaintiff acted without cause, arbitrarily or in bad faith. This question was for the jury. And if the court had submitted this question alone to the jury, instructing them that the bond was in fact "good and sufficient," or if the jury had found the bond to be good and sufficient, we think the evidence was sufficient to sustain a verdict that plaintiff was justified in refusing to accept the bond.

But clearly the evidence is not conclusive that he was so justified. And it is, of course, evident that the answer of the jury to the second question was the only answer possible, after they had found that the bond was not good and sufficient. We therefore are unable to draw the conclusion that the answer that plaintiff was justified in refusing the bond was based upon any ground other than the false one of its insufficiency in fact. We cannot know what the decision of the jury would have been, if the first question had been answered as we hold it should have been. Therefore the errors in submitting and answering the question as to the sufficiency of the bond were prejudicial, and entitle defendant to a new trial.

4. On another trial, unless the evidence is different, the sole ques-

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tion should be: "Was plaintiff justified in refusing to accept the bond?" If he was, then we think it clear that he was entitled to recover in this action the possession of the goods and the value of those retained by defendant. If he was not justified in refusing the bond, then the giving of it and the subsequent performance of its condition by perfecting the title discharged the chattel mortgage, and defendant would be entitled to recover the value of the goods taken by plaintiff on the writ of replevin. Unless there be further evidence tending to show that the bond was not in fact "good and sufficient," it should be so held as a matter of law, and the question whether plaintiff was justified in refusing it should be submitted to the jury under proper instructions.

In this connection we are clear that the statute prescribing the requirements of "official" bonds has nothing to do with the case. This was not an "official" bond, or one required by statute. It was not necessary to its sufficiency that there be more than one surety, or that the sureties justify in double the amount of the bond. The trial court should not have referred to this statute in his charge.

We may say, also, that the question whether plaintiff had "reasonable grounds to believe himself insecure" was correctly held not to be an issue in the case. The chattel mortgage was due if plaintiff's refusal to accept the bond was justified. If such refusal was not justified, the title having been in fact perfected within the time named, the mortgage was discharged.

It is not clear who has the title to the Oregon land. Plaintiff has it under the deed from defendant, unless his title has been lost by the foreclosure of the mortgage on the land. If he still has the title, or a right of redemption, the court should require a conveyance by him to defendant as a condition precedent to a recovery in this action.

Order reversed, and new trial granted.

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YOUNG MEN'S CHRISTIAN ASSOCIATION OF MINNEAPOLIS v. JOHN LOUIS HORN.[1]

January 31, 1913.

Nos. 18,001—(271).

Perpetual trust in personal estate.

Under R. L. 1905, § 3249, subd. 5, a perpetual trust in personalty may be created for the purposes therein designated, subject to the control of the district court as thereby specified.

Beneficiary not indefinite.

A gift of a bond to an individual trustee, in trust to pay the income thereof, or, in case of its payment or sale, to pay the income of the investment of the proceeds, "to and for the benefit of the Young Men's Christian Association of the City of Minneapolis, a corporation of the state of Minnesota, the same to be received and used by said corporation in perpetuity in carrying out its purposes of providing boys and young men, members of the association, with education along industrial lines," *held* not invalid for indefiniteness in the designation of the beneficiary; the corporation being the beneficiary, notwithstanding that it was to receive the profits of the trust upon a condition as to its use.

Conveyance upon trust valid.

A conveyance of land in trust "to convert the same into personalty at the earliest practical moment when such conversion can be made without a sacrifice of the value" thereof, the rents, and, after such sale, the income from the proceeds, to be held in trust for a lawful purpose in perpetuity, *held* valid.

Action in the district court for Hennepin county to recover $25,

[1] Reported in 139 N. W. 806.

Note.—The authorities on the question whether a gift for the benefit of members of a particular organization is a charity, are collated in a note in 5 L.R.A.(N.S.) 687.

The question of the enforcement of a general bequest for charity or religion is discussed in elaborate notes in 14 L.R.A.(N.S.) 49 and 37 L.R.A.(N.S.) 993. And the effect of the rule against perpetuities on the enforcement of such a bequest is considered on page 66 of the note in 14 L.R.A.(N.S.)

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interest collected upon a certain bond, and $40, rents collected from real estate referred to in the trust agreement mentioned in the opinion. The complaint made the trust agreement a part thereof. The answer admitted the receipt of the money, and for a defense alleged that the funds were held apart by defendant, that he was anxious to turn them over to the party entitled thereto but was advised by counsel that the plaintiff was not that party, for the reason that the trust attempted to be created by the agreement was null and void, for the following reasons: (1) The attempted trust did not fall within any of the classes of trusts authorized by R. L. 1905, c. 60; (2) the attempted trust created a perpetuity in real property in violation of section 3249, subd. 6; (3) the provision permitting conversion of real property into personalty did not relieve the agreement from invalidity under that subdivision 6; (4) the attempted trust created a perpetuity in personal property in violation of chapter 60; (5) the trustee named in the agreement was not appointed by the district court in accordance with the provisions of subdivision 5 of section 3249; (6) the beneficiaries intended to take under the trust were uncertain. The plaintiff demurred to the answer upon the ground that it did not state facts sufficient to constitute a defense. From an order, Booth, J., overruling the demurrer to the answer, plaintiff appealed. Reversed.

J. M. Martin and *C. E. Drake,* for appellant.

John Louis Horn and *John R. Van Derlip,* for respondent.

PHILIP E. BROWN, J.

Appeal by the plaintiff from an order overruling its general demurrer to the answer.

The complaint, after alleging the incorporation of the plaintiff under the laws of this state, for the purpose, among others, of providing boys and young men with industrial education, charges in substance that in April, 1912, one Moore assigned and delivered to the defendant a $1,000 interest-bearing bond, and conveyed to him certain real property in Minneapolis, and that the parties contemporaneously executed an instrument in writing, which, after reciting the matters above stated, provided that the real and per-

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sonal property so conveyed and assigned had been transferred to and accepted by the defendant in trust for the following purposes:

"First. To receive and take charge of said bond, and, in case of payment thereof or of any sale thereof, to invest and loan the proceeds of the same for the benefit of the beneficiary herein named, and to collect and receive the interest and income from said bond and from said proceeds, and to pay the net interest and income, from time to time as received, in perpetuity, to and for the benefit of the Young Men's Christian Association of the city of Minneapolis, a corporation of the state of Minnesota, the same to be received and used by said corporation in perpetuity in carrying out its purposes of providing boys and young men, members of the association, with education along industrial lines.

"Second. To receive, enter into and take possession of said real estate, and to convert the same into personalty at the earliest practical moment when such conversion can be made without a sacrifice of the value of said real estate, and to collect and receive the rents, income and profits therefrom, and from the proceeds of any sale thereof, to pay, in perpetuity, all of the net rents, income and profits, as received from time to time, to and for the benefit of the Young Men's Christian Association of the city of Minneapolis, for the maintenance, support and benefit of said association, with full power and authority in said party of the second part to sell and convey said real estate at any time, and to invest and loan the proceeds thereof, and to change any investment thereof from time to time, as he may deem to be for the best interests of said trust; all such proceeds, and invested and reinvested proceeds, to be held and deemed at all times to be the principal of said second trust fund, and the net interest and income from the same to be paid to said association as aforesaid, in perpetuity, for the uses and purposes herein expressed."

The complaint further alleged that the defendant subsequently collected $25 interest on the bond, and $40 in rents from the realty, but refuses to pay the same to the plaintiff.

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The defendant answered, admitting all the allegations of the complaint, but denying all liability, and alleged that the trust attempted to be created by the instruments was void on various grounds stated.

The court overruled a general demurrer to the answer, and this is an appeal from such order.

The parties agree that the proper construction of the second provision of the trust agreement contemplated that the trust thereby attempted to be created is for the sole purpose of benefiting and providing an income for the maintenance and support of the plaintiff.

1. Of the several grounds of invalidity urged against the trust here involved, we will first consider whether it is invalidated by its perpetuity features, assuming for the time being that the trust property consists entirely of personalty; and as the law is, and has been "from the beginning of the state, that express trusts, except as authorized or modified by statute," are prohibited (Watkins v. Bigelow, 93 Minn. 210, 223, 100 N. W. 1104, 1109), we must, in determining the above question, look exclusively to our statutes. Furthermore, since the decision in Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948, there is no doubt but that this rule applies to all trusts, whether public, charitable, or otherwise, and whether in personalty or realty.

The present statute on the subject of trusts is comprehensive and reasonably clear; but, as in most cases where the existing statute is the outgrowth or culmination of legislative enactments during many years, we have found the history of the statute in question very helpful. Indeed, in the present instance, a review of the former statutes seems indispensable to a clear comprehension of the question before us. These statutes are as follows:

G. S. 1866, c. 43, § 11, contained four subdivisions, corresponding to subdivisions 1 to 4, inclusive, of the present statute (R. L. 1905, § 3249); but we need not set them out at this place.

Laws 1875, p. 84, c. 53, added what is now subdivision 5 of the present statute.

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G. S. 1878, c. 43, § 11, was the same as subdivisions 1 to 5, inclusive, of the present statute.

Laws 1893, p. 202, c. 83, amended G. S. 1878, c. 43, § 11, as follows: "That section eleven of chapter forty-three of the General Statutes of one thousand eight hundred and seventy-eight, relating to uses and trusts, be and the same is hereby amended by adding at the end thereof the following words: Provided, however, that nothing in this chapter or in any law of this state contained shall be construed as preventing the creation of any trust in writing to endure for a period not longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of such persons; such writing to fully set forth the nature and terms of the trust; but all such trusts are hereby authorized and allowed; Provided further, that any and all trusts which do not permit the free alienation of the legal estate by the trustee, so that, when so alienated, it shall be discharged from all trusts, shall be deemed and construed as heretofore and shall not be authorized by the provisions of this act."

And chapter 84 of the same Laws [p. 202] added a sixth subdivision, as follows:

"Any incorporated city or village in the state of Minnesota now or hereafter organized is authorized to receive by gift, grant, devise or bequest and take charge of any money, stocks, bonds, personal, real or mixed estates, choses in action and property of any kind whatever, and to invest, reinvest and loan the same for the benefit of any public library association in such city or village and any public cemetery association located within ten miles of the corporate limits of any such city or village free from taxation, and administer the same in accordance with the will of the testator or the grant of the grantor of the estate. The district court of the state of Minnesota shall have the power in respect to such trust estate and trustees as are conferred on the said court by this chapter in respect to other trusts."

The statute, as thus amended, was carried into G. S. 1894 as section 4284; the only change being that the proviso added by Laws

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1893, p. 202, c. 83, was made to follow the sixth subdivision added by the same laws.

Laws 1897, p. 87, c. 80, added a section, "to be numbered seventh," as follows:

"For the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, provided such trust shall not endure for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of such persons; provided, further, that any and all trusts, which do not permit the free alienation of the legal estate by the trustee so that when so alienated it shall be discharged from all trusts, shall be deemed and construed as heretofore, and shall not be authorized by the provisions of this subdivision.

This statute expressly repealed so much of Laws 1893, and all other prior laws inconsistent therewith, thus substantially repealing the proviso added by Laws 1893; for it, as will at once be noticed, covers exactly the same subject as the proviso, the only difference being that the proviso was couched in the negative, and operated by way of a rule of construction, and applied to the whole of the statute to which it attached, whereas the new subdivision was in the form of an affirmative authorization, and its limiting provisos applied only to the subdivision of which they were a part.

Laws 1901, p. 101, c. 95, amended G. S. 1894, § 4284, subd. 6, which is subdivision 7 of the present statute (R. L. 1905, § 3249), by adding kindergartens to the list of beneficiaries of the trusts thereby authorized.

Laws 1903, p. 188, c. 132, amended subdivision 6 of section 4284, G. S. 1894, in such manner that it was declared in Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104, to authorize practically every possible kind of trust almost without limit; but this amendment was declared unconstitutional for insufficiency of title.

Thus the law stood when the revision of 1905 was undertaken. In their report to the legislature, however, the Revision Commission

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dropped subdivision 5 of section 4284, G. S. 1894, stating that it was so done "in the belief that it is fully covered by the new subdivision," manifestly referring to Laws 1897, p. 87, c. 80, now subdivision 6 of the present statute. In their report, submitting such new subdivision, they likewise omitted the last proviso thereof; and they omitted Laws 1903, p. 188, c. 132, because, as noted above, it had been held void. See Report of Revision Commission 1905, p. 658, and Notes of the Revisors, p. 27. The legislature, in adopting the revision reinstated subdivision 5 and the proviso to the new subdivision, which, as stated, had been omitted, and then enacted the present statute, R. L. 1905, § 3249, practically as reported; the subdivision formerly denominated 6, however, becoming subdivision 7, the statute in its present form being as follows:

"**3249. Purposes of Express Trusts — Duration.**—Express trusts may be created for any of the following purposes:

"1. To sell lands for the benefit of creditors.

"2. To sell, mortgage, or lease lands for the benefit of legatees or for the purpose of satisfying any charge thereon.

"3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in chapter 59.

"4. To receive the rents and profits of lands and to accumulate the same, for either of the purposes, and within the limits, prescribed in chapter 59.

"5. To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust; and the district courts of the state shall, upon petition and hearing, have power to appoint a trustee for the purpose herein set forth, requiring such trustee to give such bond for the faithful execution of such express trust as to the court may seem right and proper; and express trusts created under the provisions of this paragraph shall be administered under the direction of the court.

"6. For the beneficial interests of any person or persons, whether such trust embraces real or personal property or both, when the

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trust is fully expressed and clearly defined on the face of the instrument creating it: Provided, that the trust shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of them, and that the free alienation of the legal estate by the trustee is not suspended for a period exceeding the limit prescribed in chapter 59.

"7. Any city or village may receive, by grant, gift, devise, or bequest, and take charge of, invest, and administer, free from taxation, in accordance with the terms of the trust, real or personal property, or both, for the benefit of any public library or of any public cemetery located in, or within ten miles of, such city or village, or for the purpose of establishing or maintaining a kindergarten or other school or institution of learning therein."

It is apparent, from the mere reading of the statute and the provisions of the trust here involved, that the perpetuity attempted to be created can be sustained, if at all, only under subdivision 5, which has heretofore not been construed. The general question then, is: Does this subdivision authorize a perpetual trust in personalty for the purposes specified therein? No cumulations being authorized by the alleged trusts in the instant case, the particular question before us is whether a person or a corporation may, under subdivision 5, be given a perpetual endowment of the profits of a trust in personalty.

Standing alone, this subdivision would certainly seem to authorize the trusts therein defined, without limit upon duration. Before its enactment by Laws 1875, p. 84, c. 53, a trust in personalty could not be created in this state; all trusts except those authorized by statute having been abolished by G. S. 1866, c. 43, § 1, and there being then no provisions in our laws authorizing trusts in personalty. Upon the enactment of subdivision 5, therefore, the question which now arises might then have arisen, namely, what was the effect of this addition to the statute? Did it merely restore the common law as to trusts in personalty, with, among other things, its limitations

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against perpetuities and likewise its exceptions to and qualifications upon such limitations?

We cannot think that such was the intention of the legislature, for this would be to restore pro tanto the evils against which the trust statute was directed, and likewise the uncertainty and confusion which had long since become symbolized by the term "common-law rule against perpetuities." But, be that as it may, there was nothing in subdivision 5, when adopted, nor in the other subdivisions of the statute, to indicate any intent or purpose other than to authorize certain kinds of trusts in personalty without limit as to duration. The other subdivisions of the statute were ex vi termini separate and independent, and subdivision 5 was enacted as a fifth and separate subdivision. Hence the fact that the trusts authorized by subdivisions 1 to 4, inclusive, were limited as to duration or qualified by certain specific restrictions, either by reason of their purpose or by the terms of the authorization, not only does not give rise to any inference of intention to place similar restrictions upon the trusts authorized by subdivision 5, but affords a presumption directly to the contrary. It would seem, then, that up to 1893, no change in the law having been made in the meantime, a perpetuity might be created in personalty for the purpose of investment for the benefit of the beneficiaries, and this without any inhibition against suspension of the right of alienation of the legal estate so as to free it from the trust; the absence of such an inhibition possibly being due to the fact that investment necessarily imports alienation of the specific property conveyed or given in trust. It may also be well in this connection to note that the terms of the authorization of subdivision 5 contemplate that the administration of the trust be carefully guarded by the provision with reference to the jurisdiction of the district courts.

In 1893, however, by chapter 83 of the Laws of that year, which we have quoted above, a proviso was added to G. S. 1878, c. 43, § 11, "at the end thereof," and of such terms that it would seem to have been intended to apply to all that went before it; that is, to subdivisions 1 to 5, inclusive. This proviso, it will be noted above, is twofold, a proviso within a proviso, the first of which being an enlarge-

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ment of the classes of trusts authorized, by way of a negation upon the construction of the preceding subdivisions, and the second being a similar negation upon the construction of the first proviso, and to the effect that the enlargement of the classes of trusts effected by the whole proviso should not be construed to authorize any further restrictions upon alienation than was already allowed; that is, that any such further restrictions were not authorized by "this act," thereby meaning the act by which the proviso was added, and not the chapter and section which were being amended.

This construction of the proviso is strongly supported by the decision of this court in City of Owatonna v. Rosebrock, 88 Minn. 318, 324, 92 N. W. 1122, to the effect that the scope of subdivision 6 of section 4284, G. S. 1894, which is the same as subdivision 7 of the present statute, was not restricted by such proviso. The case cited, furthermore, is, we think, directly in point to the proposition that under subdivision 5 as it then stood a perpetuity might be created. The fund in that case was given to a city in trust for the purpose of maintaining a kindergarten, and such gift was without limitation upon the duration of its trust character, thus being in fact a perpetuity, though not so denominated. Yet the gift was upheld, the court, [at page 324,] saying: "The proviso attached to section 4284 in reference to perpetuities has no application to bequests of this character to a municipality, they being expressly authorized"—and not, the court might have added, being dependent upon the sweeping authorization of the first proviso.

This language disposes of the respondent's contention that the trust here involved is unauthorized for the reason that subdivision 5 does not expressly authorize a perpetuity in terms. An inhibition against a perpetuity, and in fact any provision as to duration, is a pure limitation, and any limitation upon power or authority must either arise from the limited terms of the grant, or else be superimposed upon a prior unlimited grant. If no limit is imposed, therefore, and if the terms of the grant do not of themselves import a limit, then the grant is without limit. Here the trusts authorized by subdivision 5 are limited as to purpose and property, but

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unlimited as to duration; for the general right to exist is granted, and no subsequent limitation upon such existence is imposed.

The respondent, however, insists that there is no warrant for the claim that the trust here involved is authorized by subdivision 5, for the reason that the subject is fully covered by subdivision 6. In reply to this it might simply be said that so also thought the Revision Commission (see their report, cited supra), but that the legislature deemed otherwise, as indicated by the fact that they reinstated subdivision 5, after it had been omitted by the Commission in the belief that its subject-matter was covered by subdivision 6. Even if this were all we had to guide us, we think it would be sufficient as against the objection here urged. However, we will consider briefly subdivision 6.

This subdivision was, as we have indicated in our review of the statutes, added by Laws 1897, p. 87, c. 80, or rather the proviso to section 4284, G. S. 1894, was thereby changed into a subdivision. That such was the only effect of the act of 1897 is, we think, clearly apparent from the analysis of this act and the proviso, and the comparison of the two which we have already made. Subdivision 6 must therefore be held to be merely a general authorization, subject to specified limitations upon duration and in the matter of restrictions upon alienation, intended to cover numerous occasions that may require a trust, but which are not within any of the other subdivisions. Such clearly was its sole purpose when it was a proviso, and we cannot see that this purpose has been either enlarged or restricted by the change from proviso to subdivision. This, we venture to say, was the theory upon which the legislature reinstated subdivision 5. On the revision, moreover, no change was made in subdivision 6, except by the insertion of the words "whether such trust embraces real or personal property or both," and by a change, not here material, in the inhibition against restrictions upon alienation.

We hold that, so far as its perpetuity feature is concerned, the trust here involved, assuming for the moment that its corpus consists entirely of personalty, is authorized by subdivision 5.

It is true, as contended by the respondent, that the spirit of our laws is against perpetuities; but we think, nevertheless, that the legis-

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lature did not intend to place any limitation upon trusts of this kind, any more than upon those authorized by subdivision 7, as to which we have seen that no time limit is deemed to have been imposed. We have nothing to do with the wisdom of this lack of limit upon duration, and if it should lead to abuse the remedy would be with the legislature. By its terms, however, subdivision 5, though seemingly very broad at the first glance, should never be invoked as authorizing accumulations; nor does it authorize any restriction upon the alienation of the legal estate, for the very purpose of the trust thereunder requires investment, which is the same purpose for which the greater portion of all personal property is used, with the usual incidents of loss or dissipation, as well as gain. Since, therefore, the trust is only in the profits, the only evils which could arise therefrom would seem to be those which may arise from a perpetual direct endowment of a person or corporation in a very large sum. That such endowment might lead to evil results is readily imaginable, but that no such evils are now apparent would seem to follow from the fact that the legislature has let the subdivision stand so long without change, and, further, from the fact that direct endowments are of frequent occurrence, and often of manifest benefit to the community, to the state, and to humanity.

2. It is contended by the respondent that the first portion of the trust, which we will hereinafter designate as the first trust, is void for uncertainty of the beneficiaries. The language of the instrument in this regard is as follows: "To and for the benefit of the Young Men's Christian Association of the city of Minneapolis, a corporation of the state of Minnesota, the same to be received and used by said corporation in perpetuity in carrying out its purposes of providing boys and young men, members of the association, with education along industrial lines."

It must be conceded, as contended by the respondent, that it is the settled law of this state that a gift to a private individual, in trust for either personal or charitable purposes, must designate the beneficiaries at least in such a way that they are capable of being rendered certain, but that a gift to a corporation, with directions as to

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use, may be valid, not as a trust, but as a gift upon condition, though the ultimate beneficiaries of the gift are more or less uncertain. Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948.

"The difference, however, between an individual and corporation, in the supposed case, is manifest," said Chief Justice Start, at page 209:[1] "The corporation would be expressly organized and authorized by law to do the work for which the bequests were made, and, should it abuse its franchise, it could be dissolved. Not so in the case of an individual. The distinction is clearly illustrated by the case of Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031:[2] The court held in that case that a devise to two individuals (naming them) or the survivor of them, in trust for the use of the Salvation Army (unincorporated) at St. Paul, was a gift in trust, and void, because the beneficiaries were uncertain; but it was held that a devise to an incorporated church, which was authorized to acquire property by gift for mission purposes, to aid the cause of home and foreign missions equally, was a direct gift to the church, and not in trust, and for that reason alone valid."

Again, in Bemis v. Northwestern Trust Co. 117 Minn. 409, 412, 135 N. W. 1124, it was held that a bequest in trust to establish a "Home for the Aged," but which left it entirely to the discretion of the individual trustees as to when the corporation which was to administer the trust was to be organized was invalid, and Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104, was distinguished on the ground that in that case the organization of the corporation was definitely provided for, and in the case thus distinguished the court said, at page 226:[3]

"If such gift to the corporation be absolute, then the Shanahan case, 88 Minn. 202, 92 N. W. 948, is not here in point, for the gift in that case was to individuals in trust for an uncertain class of beneficiaries. In the opinion in that case the distinction is pointed

[1] [92 N. W. page 949.]
[2] [38 L.R.A. 609, 65 Am. St. 559.]
[3] [100 N. W. at page 1110.]

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out between such a gift to individuals and one to a corporation authorized, as a part of its corporate work or business, to acquire and hold property for the purposes for which the gift was made. A gift by deed, devise, or bequest to an existing corporation, or to one to be thereafter organized within the time limited by law, with directions or conditions as to the use or management of the subject-matter of the gift which are reasonably consistent with the corporate purposes of the donee, is not a gift in trust, but an absolute one to the corporation, within the meaning of our statute of uses and trusts [citing many cases, including Cone v. Wold, 85 Minn. 302, 88 N. W. 977]. The cases cited fully sustain this proposition. In Cone v. Wold it was directly held that: "It is legal for a donor to prescribe, by way of limitation, that his gift shall be kept and preserved, so as to subserve a purpose which a donee corporation was created to promote. To so prescribe is nothing more than to declare that the trust fund shall be devoted to the objects which the legislature had in view when providing for the existence of the corporation.'"

It might be contended that this doctrine should, in reason, be confined strictly to cases where the corporation is organized for the sole purpose of carrying out the particular trust, or, at least, the purposes which the trust is designed to promote; but, as indicated by the excerpts above quoted, the rule has not been thus limited by our decisions. In Lane v. Eaton, supra, at page 146, the court said:

"A part of the general purposes for which this church is organized is missionary work, and funds given to it to be used in that work are not given in trust in the technical sense of that word. Thus, in Atwater v. Russell, 49 Minn. 57, 82, 51 N. W. 629, 52 N. W. 26, lands were conveyed with direction that the proceeds be used by a certain incorporated hospital 'for the support of charity patients in the same.' This kind of charity work was a part of the purposes for which the hospital was incorporated, and the gift was held to be absolute, and not in trust. See, also, Bird v. Merklee, 144 N. Y.

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544, 39 N. E. 645;[1] Domestic & Foreign Missionary Soc. v. Gaither, 62 Fed. 422."

Under the doctrine of these cases, we think that the gift of the income of the bond, covered by the first trust herein involved, must be sustained, notwithstanding that the donor intended that the young men and boys mentioned should receive the ultimate benefit of the gift. The language of the donation plainly indicates a gift of the proceeds of the bond to the corporation, with directions as to its use, or possibly upon condition. To hold that the young men and boys referred to are the beneficiaries in the sense contemplated by our trust statutes and the cases construing the same would be a very strained construction. If the donor had seen fit to make periodical gifts of the proceeds of this bond directly to the corporation, each gift would, under our decisions, unquestionably have been valid. Then why should the gift be invalidated because made through a third party? "Qui facit per alium facit per se." Is the beneficiary any the less uncertain where the gift is through a third person? Here we have a gift, or rather a series of gifts, made through a trustee, to a certain corporation, for use in carrying out one of the purposes for which it was incorporated, and we cannot distinguish the case from either Lane v. Eaton, supra, or Atwater v. Russell, supra. In the latter case, indeed, the gift was to trustees for the purpose of sale and payment of the proceeds to a certain corporation, which was to receive the same for a certain use, and the gift was upheld.

We must not confuse the question of the validity of the trust as creating a perpetuity with that concerning the certainty of the beneficiaries. These questions are entirely separate and distinct; and, having held that the trust is valid so far as concerns perpetuities, we fail to see how any other conclusion with regard to the other question can be reached than as above indicated. In short, since a gift in the terms of this trust would have been valid if it had been made directly to the corporation, and since there is nothing illegal in the power which he has conferred upon the trustee to make the gifts, the trust must be sustained.

3. As to the donation of the land, which we will designate as the

[1] [27 L.R.A. 423.]

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second trust, there is no question as to the sufficiency of the designation of the beneficiaries, the sole question, other than that disposed of in subdivision 1 of this opinion, being whether this second trust is invalid, as a trust in land which is not authorized by the statute.

The provisions of the instrument in this regard may be summed up as a gift of land to a trustee, to be by him sold and converted into personalty "at the earliest practical moment, when such conversion can be made without a sacrifice of the value of said real estate," and the proceeds thereof are to be "held and deemed at all times to be the principal of said second trust fund." "It is well settled," said the court in the case of In re Tower's Estate, 49 Minn. 371, at page 379, 52 N. W. 27, 29, "that, where a sale is directed in the instrument creating the trust, such sale is not in contravention of the trust, and that it is competent for a testator to provide for the termination of a trust in real estate by a power of sale incorporated in his will, and vested in the trustees or a third person."

Again, in the same case at page 380:[1] "Under the construction given to the sections of the statute above referred to, it would seem to follow that, if the proceeds of lands converted into money by the trustees under a power of sale are thereafter to be held upon a trust valid as to such converted fund, the trust could be sustained as not in contravention of the statute forbidding the suspension of the power of alienation for more than two lives."

So, also, in Atwater v. Russell, 49 Minn. 22, at page 56,[2] it was held that where trustees were given the power to sell lands, there was no restriction upon alienation. Said the court:

"The clause in the codicil following the devise of land to the executors: 'And as soon as, in the judgment of my said executors, the same can be sold for a reasonable price (and not later than ten years after my decease), to sell the same, either in a body or in separate portions,' etc.—does not suspend the power of alienation for any period. The executors may not exercise the power till the end of the ten years, and ten years may extend beyond the duration of two lives. But that the power of alienation may not be exercised within the period prescribed by statute is not the test. The test is: Can it

[1] [52 N. W. at page 30.]

[2] [51 N. W. at page 629.]

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be exercised, and a good title passed, within the prescribed period? The executors had the power to alienate and pass the title as soon as they qualified. That they are to sell as soon as in their judgment the same can be sold for a reasonable price does not limit the power to alienate and pass the title, and puts no restriction on their exercise of it beyond what the law would impose, though the clause were omitted."

Likewise in a case between the same parties (49 Minn. 57, 77, 78, 51 N. W. 629, 630) the court said: "For the reasons stated in the opinion in the will case (referring to the case reported [49 Minn.] at page 22)[1] all being pertinent and forceful here, the power of the trustees to alienate this land and to pass the title in the fee to a purchaser was not suspended for any period of time."

Recurring, now, to the language of the trust here involved, it is at once apparent that the trustee, not only has the right to sell, but it is his positive duty to sell. Hence the trust does not violate the inhibition of subdivision 6 of the statute concerning restrictions upon alienation; and if it does not violate the provision thereof that "the trust shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of them," it is valid as a trust in land under such subdivision, the correctness of which proposition is, we think, sufficiently demonstrated by our analysis of this subdivision in the first part of this opinion.

What, then, is the purpose of this limit upon duration? Can it be materially different from the purpose of the inhibition against restrictions upon alienation? And if a power and duty of sale in the trustee satisfies the latter, why not also the former? Furthermore, is it conceivable that there is any land which cannot be sold at its present, not future, real, not speculative, value, within 21 years, the shortest period possible under this limit upon duration? If land cannot be sold within that time, it would be safe to say that it had no value during such time, for the market price is the measure of value in the law. Would a court, called upon to aid in the administration of this trust, allow the expressed will of the donor that the trustee shall convert this land "at the earliest practical moment when such

[1] [51 N. W. at page 624.]

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conversion can be made without a sacrifice of the value," to be defeated by allowing the land to be held for 21 years? We venture to say that, if the instruction had been to sell "forthwith," a court would prevent a sale at a sacrifice. Is not, then, the direction here given practically equivalent to an instruction to sell "forthwith?" If so, how can it be said that the trust exceeds the limit on duration, when the holding of it beyond the time when a court would direct a sale would constitute a breach of the trust? Subject to the limitations above mentioned, a trust may be created under subdivision 6 for any purpose whatever, provided, of course, it be not otherwise illegal. Hence land may be given to one person in trust to sell within any time certainly up to 21 years, and to pay the proceeds to another for any lawful purpose, which, under the conclusion above announced as to the scope of subdivision 5, might be a trust to invest for the benefit of a third person. Then why should the rule be different because the first person is eliminated and the second is made the recipient of both trusts?

But if there be doubt whether this trust can be sustained under subdivision 6 as a trust in land, it is certainly, under the decisions from which we have quoted, sustainable under subdivision 5 in connection with the doctrine of equitable conversion. See In re Tower's Estate, supra; Atwater v. Russell, supra. The only argument against this view which occurs to us would be that this doctrine cannot be invoked to evade a statute (3 Pomeroy, Eq. Jur. § 1166), but we have no such question here. The great majority of trusts might be made perpetual by continuous violation of their terms; but this is not the evil aimed at by the statute, which is in the main the tying up of the legal title. Where, therefore, even in the case of alleged evasions, the very purpose of a trust in land is to make an actual conversion thereof for a lawful purpose, we cannot see where there would be any evasion of the statute. If, however, on the trial it should appear that there was an actual attempt to evade the statute, then, of course, the question of the effect of such evasion upon the doctrine of equitable conversion would require consideration.

4. The provisions of subdivision 5 concerning the powers of the district court became operative only after the creation of the trust, and do not affect the validity of its creation. They are ample, how-

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ever, to keep the trust within the bounds contemplated by the statute.

Order reversed.

ETHEL SPENCER v. COURT OF HONOR.[1]

February 7, 1913.

Nos. 17,759, 17,760, 17,761—(147, 148, 149).

Service of process — foreign fraternal beneficiary association.

Section 19, c. 345, Laws 1907, providing for the service of process upon foreign "fraternal beneficiary associations," construed, and *held* to furnish the only method for the service of a summons in a civil action upon such an association.

Statute valid.

The statute is not unconstitutional, as class legislation, because the association is given 30 days in which to answer, when all other corporations are allowed but 20 days.

Special appearance.

An appearance by way of motion to set aside a judgment rendered upon an unauthorized and void service of the summons, being specifically limited to the purposes of the motion, *held* a special appearance, though the motion also challenged the jurisdiction of the court upon the subject-matter of the action.

Three actions in the municipal court of St. Paul to recover $294.63, in which Ethel Spencer, Mary A. Spencer and Ambrose E. Spencer were the respective plaintiffs. Judgments were entered by default. Defendant, appearing specially for the purposes of the motion, moved to set aside the judgments on the grounds mentioned in the first paragraph of the opinion. The motions were denied, Finehout, J. From the orders denying the motions, defendant appealed. Reversed.

Spooner, Laybourn & Lucas, for appellant.

A. J. Hertz, for respondent.

Brown, C. J.

Defendant is a fraternal beneficiary association, organized and

[1] Reported in 139 N. W. 815.

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existing under the laws of the state of Illinois. As such it was at all times herein involved authorized to transact and do business in this state. Some time during the year 1908, defendant for value duly issued a certain policy or certificate of insurance upon the life of Herbert U. Spencer for the sum of $1,000, payable on the death of Spencer to Mary A., Ethel, and Ambrose E. Spencer, plaintiffs in these several actions. Spencer died on May 13, 1911, and thereafter these actions were brought to recover upon the policy. They were brought in the municipal court of the city of St. Paul, and the summons issued therein was in the usual form and required defendant to answer the complaint within 10 days from the date of service. The service in each case was made upon a person claimed by plaintiff to have been at the time an officer and agent of defendant residing in this state. No appearance was made by defendant, and default judgments were rendered in each action for a proportionate share of the money due on the policy, with costs. Thereafter defendant, appearing specially, for the purposes of the motion only, moved the court to set aside the judgment on the grounds: (1) That the summons was not served as required by law; and (2) that but one cause of action existed in plaintiffs' favor, which was joint, and the amount thereof, $1,000, exceeded the jurisdiction of the court. Separate motions were made in each action, were each denied, and defendant appealed. The questions presented are identical in each case, and we dispose of them by one opinion.

1. Defendant is a fraternal beneficiary association, incorporated under the laws of the state of Illinois. The person upon whom service of the summons was made was an agent with authority to organize local branches of the order in this state. The only question requiring consideration is whether service upon that person was sufficient to vest jurisdiction over defendant.

It is the contention of defendant that service could lawfully be made only upon the state insurance commissioner, as provided for by chapter 345, p. 469, Laws 1907 [R. L. Supp. 1909, §§ 1704—11 to 1704—41]; while plaintiffs contend: (1) That in actions of this kind service may be made either under that statute, or upon an agent of the defendant within the state; and (2) if the statute be held to prescribe the exclusive mode of service, that it is unconsti-

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tutional as class legislation. We sustain defendant's contention that the statute referred to furnishes the only method for the service of legal process in such cases.

The statute deals with both foreign and domestic "fraternal beneficiary associations." It provides for the incorporation of the domestic and the admission of the foreign association to transact its business in this state. One of the conditions upon which the foreign associations may be licensed in this state is that it shall "appoint in writing the insurance commissioner and his successor in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it, which is served upon such attorney, shall be of the same legal force and validity, as if served upon the association," and, further, that "service may only be made upon such attorney, must be made in duplicate and shall be deemed sufficient service upon such association: Provided, however, that no such service shall be valid or binding against any such association when it is required thereunder to file its answer * * * in less than thirty days after the date of such service."

The language of the statute is plain and unambiguous, and the provision thereof that the service of process "may only be made upon such attorney" leaves no room for doubt upon the legislative intent to provide that method of obtaining jurisdiction of such corporations as exclusive. It was for all practical purposes so held in State v. Brotherhood of American Yeomen, 111 Minn. 39, 126 N. W. 404, though that case involved the service of a writ of mandamus under directions of the court, and not the service of a summons in a civil action. But the decision there rendered controls the present case. It was clearly not the intention of the legislature to leave the manner of service optional with the plaintiff in each case, but rather to definitely fix a single method of acquiring jurisdiction of the corporations and associations included in the particular statute. We so hold.

The further contention of plaintiff that the complaint does not allege or show that defendant is a "fraternal beneficiary association," and therefore that the service in question was valid, is not sustained.

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Defendant is in fact such an association, organized under the laws of the state of Illinois, and that fact is affirmatively shown by the affidavits presented on the motion to set aside the service. It is not material that the fact was not disclosed by the complaint.

2. Nor do we sustain the contention that the statute in unconstitutional because of a discrimination in favor of the corporations included therein. The alleged discrimination consists in the fact that the statute grants 30 days within which the defendant may appear and answer the complaint, whereas all other foreign corporations are given but 20 days for appearance. This is not fatal to the statute. The objection is not a matter of substance. Reasons may have been presented to the legislature which in its judgment justified granting a longer time to answer in such cases, and we are not prepared to say that the legislative discretion was improperly exercised.

What was said in the case of Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398, upon the question of the constitutionality of the statute, was with reference to the contention there made that the summons in that action was utterly void, because it required defendant to answer within 20 days, instead of 30 days, as provided by the statute. But we did not intend to be understood as intimating an opinion that the statute was unconstitutional. The question was merely suggested. Indeed, that decision proceeds upon the theory that the statute is perfectly valid, for we sustained the right of plaintiff to amend the summons by changing the same in respect to the time defendant was required to answer. The original summons limited the time to 20 days, and the amendment changed it to 30 days, so as to conform to the requirements of the statute. We sustain and uphold the statute.

3. The further contention of plaintiff that defendant's appearance in the action was general, and therefore a waiver of proper service of the summons, requires no extended discussion. Defendant's appearance in the action was expressly designated as special, and for the purposes of the motion only. The claim that the appearance was general is founded in the fact that defendant's objection to the service of the summons also raised the question whether the court had jurisdiction of the action.

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In determining whether there has been a waiver of jurisdictional defects by the form of defendant's appearance, a distinction is made by our decisions between an appearance before and an appearance after judgment. An appearance for special purposes before judgment, coupled with a demand for relief inconsistent with a claim of want of jurisdiction, is a general appearance, and a waiver of defects in the service of the summons. But where the appearance is made after judgment, and for want of proper service of process the judgment is void, a different rule applies. Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. 657.

In that case the court said that upon a motion to set aside a judgment, shown to have been void because the court had acquired no jurisdiction in the cause, an objection distinctly made upon that ground should not be deemed to have been at the same time waived from the fact that the moving party also urged in support of his motion additional reasons not inconsistent with the alleged want of jurisdiction, nor because, by asking to file an answer, he indicated his willingness to submit to the jurisdiction of the court. The same rule was applied in Covert v. Clark, 23 Minn. 539, where the court said: "When a motion to vacate a judgment is founded upon grounds taken solely with reference to their supposed bearing upon the jurisdiction of the court to render the judgment, and solely for the purpose of attacking said jurisdiction, the appearance * * * for the purposes of the motion only, is a special appearance, which has no effect in curing any objection to the judgment for want of jurisdiction over such defendant's person."

The rule of these cases controls the case at bar. The appearance of defendant was special in fact, and was limited to the objections of want of jurisdiction. The Nebraska cases cited by plaintiff (Perrine v. Knights Templar, 71 Neb. 267, 98 N. W. 841, 101 N. W. 1017, and Lillie v. Modern Woodmen, 89 Neb. 1, 130 N. W. 1004) are not in point. The appearance in those cases was before the entry of judgment.

It follows that for want of legal service of the summons the

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court was without jurisdiction in either action, and the order of the court refusing to set the judgment aside must be reversed in each case.

It is so ordered.

W. S. TELFORD v. MARIUS HENRICKSON.[1]

February 7, 1913.

Nos. 17,790—(164).

Bankruptcy — construction of section 3502.

R. L. 1905, § 3502, providing that "every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration," does not "require" a "recording or registering" within the meaning of the bankruptcy act of 1898, § 60, subd. "a," "b," as amended; and hence, where a written assignment of a claim was actually made more than four months prior to the filing of a petition in bankruptcy by the assignor, it could not be avoided by the trustee in bankruptcy as being a preference under section 60, "a," "b," though it was never filed.

Action in the district court for St. Louis county by the trustee of the estate of Henry C. Henrickson, bankrupt, to recover $9,000. The answer denied all the allegations of the complaint, except those in regard to the appointment of plaintiff's trustee and the business occupation of the bankrupt. The case was tried before Cant, J., who made findings and ordered judgment in favor of plaintiff for $5,765.-

[1] Reported in 139 N. W. 941.

Note.—As to when local law deemed to require the registering or recording of a transfer, within the meaning of § 60a of the bankruptcy act of 1898 as amended by the act of 1903, see notes in 5 L.R.A.(N.S.) 148 and 18 L.R.A.(N.S.) 1233; and the relation of the bankrupt law to assignments and insolvency proceedings under state laws is the subject of a note in 45 L.R.A. 177.

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25. From an order denying defendant's motion for a new trial, he appealed. Reversed.

R. R. Briggs, for appellant.

Thomas J. Davis, W. S. Telford and *J. A. P. Neal,* for respondent.

PHILIP E. BROWN, J.

The complaint after alleging the filing on February 4, 1910, of a voluntary petition in bankruptcy by Henry C. Henrickson, a building contractor to whom we will hereafter refer as the bankrupt, the granting thereof on February 28, 1910, and the due appointment and qualification of the plaintiff as trustee, charged that the bankrupt was insolvent at the time of the filing of his petition, and had been for a long time prior thereto, and for a first cause of action alleged that on November 17, 1909, within less than 90 days prior to the filing of the petition, the bankrupt unlawfully paid and caused to be transferred out of his assets to the defendant, who unlawfully received the same, over $4,000, wholly without consideration. For a second cause of action the plaintiff set out that on the same day and within the same period the bankrupt paid and caused to be transferred out of the assets of his estate to the defendant, who was then a creditor whose claim was unsecured, over $4,000, with intent thereby to give the defendant a preference over the bankrupt's other creditors, and that the defendant thus obtained a greater percentage of his debt than any other creditor of the same class. The complaint then, after reciting formal matters, further alleged that the defendant, at the time he received such payment, knew that the purpose was to give him preference, and also that the bankrupt was then, and for a long time had been, insolvent. The answer denied all of the allegations of the complaint save those relating to the defendant's business and bankruptcy.

The trial was without a jury, and findings were made to the following effect:

The bankrupt entered into a contract with a school district in St. Louis county, on October 8, 1908, for the erection of a schoolhouse,

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for the sum of $58,300, and proceeded to construct the building. On August 24, 1909, the bankrupt, being indebted to his brother, Marius Henrickson, this defendant, in the sum of $4,636.97 on open account, and also primarily liable on a promissory note due September 24, 1909, and the defendant being secondarily liable thereon, the bankrupt executed to the defendant an assignment in writing, for the stated consideration of $1, purporting to transfer to him all moneys due or to become due under the contract with the school district. The true consideration of the assignment, however, was the bankrupt's indebtedness referred to, together with an agreement on the defendant's part to assume and pay certain claims owed by the bankrupt to his creditors, aggregating $3,225.75, which latter convention was executed before the bringing of this action. On November 17, 1909, the school district paid to the defendant, pursuant to the assignment, the sum of $8,991.

The court further found, in substantially the following language: That at the time of the execution of the assignment the defendant had reason to believe, and in fact knew, that the bankrupt was insolvent, and knew that thereby he was obtaining a preference over the other creditors of the bankrupt of the same class; that the assignment was not given in good faith, and was never filed with the clerk of the municipality in which the assignor resided; and that the total consideration paid by the defendant in reliance upon the instrument was the sum of $3,225.75.

The court's conclusions of law were to the effect that the assignment was invalid, and that the payment to the defendant by the school district constituted an unlawful preference. The court allowed the defendant to retain the sums referred to as paid out by him, namely, $3,225.75, and ordered judgment against him for $5,765.25, with interest from November 17, 1909; and, having denied the defendant's motion for a new trial, he appealed from the order.

1. Upon these findings, the first attack upon the transfer here involved is that the assignment of date August 24, 1909, was fraudulent as against the assignor's creditors, without reference to any

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specific provision of the bankruptcy act. This ground of attack, however, is not available in this case; for, while under section 70e of the bankruptcy act the trustee may avoid any transfer which the bankrupt's creditors might have avoided, even though the same was made more than four months prior to the filing of the petition in bankruptcy (Underleak v. Scott, 117 Minn. 136, 140, 134 N. W. 731), no question of actual fraud is raised by the record before us.

The respondent's first cause of action, which is predicated upon a lack of consideration, is manifestly not sustained by the findings, and his second cause of action must be held to be based entirely upon the theory that the assignment constituted a preferential transfer under section 60, subds. "a," "b," of the bankruptcy act. We will therefore pass to this latter contention, for upon its determination depends the question as to whether the assignment can be sustained; it having been conceded, and correctly, we think, upon the oral argument, that no claim under section 67e is involved, and, even if it were not so conceded, still the assignment could not be attacked under this section, it being necessary thereunder that actual fraud be proved (Meservey v. Roby [C. C. A.] 198 Fed. 848), and there being no allegation of such fraud in the complaint. Furthermore, the defendant, throughout the trial, resisted the introduction of evidence upon the theory of actual fraud, and the findings of the court exclude every theory of recovery, except under section 60, subds. "a," "b.'

2. The respondent invokes the provisions of section 60, subds. "a," "b," on the theory that the assignment of August 24, 1909, was invalid, and hence that the payment made pursuant thereto on November 17, 1909, should be deemed to be the real transaction involved, which transaction the respondent attacks as a preferential transfer made within four months of the filing of the petition. Since, however, as we have already held, the assignment of August 24, 1909, is not, upon this record, open to attack, except under section 60, subds. "a," "b," the respondent's theory cannot be adopted, and the validity of the payment of November 17, 1909, must turn upon whether the assignment pursuant to which it was made is assailable under this section.

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We will assume, for the purposes of this case, that this issue was raised by the pleadings and that the court properly found upon it; but we will not consider the question of actual fraud, for, though the court found that the assignment was "not given in good faith," this finding, in the connection in which it was made and in view of the pleadings, must be deemed to refer to the fact that the assignee had notice of the assignor's insolvency, as bearing upon the question of a preference within the meaning of section 60, subds. "a," "b."

Was, then, the assignment such a preference? If it had been made within four months prior to the filing of the petition in bankruptcy, there could be no doubt that it was such; but it was not actually made within such time. To meet this objection, however, the respondent invokes R. L. 1905, § 3502, as bringing the assignment within the provision of section 60a of the bankruptcy act, that "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The question as to what constitutes a requirement of record or registration, within this provision, is by no means settled; most of the cases turning upon the meaning of the word "required," and there being much conflict among them in this regard. It seems that the weight of authority, and reason as well, is to the effect that the recording or registering of a transfer is not deemed to be required, unless, under the state law, the same is essential to validate the transfer as against the creditors represented by the trustee, though some of the cases seem to go considerably beyond this. See note to First Nat. Bank v. Connett, 5 L.R.A.(N.S.) 148; note to Loeser v. Savings Deposit Bank & Trust Co. 18 L.R.A.(N.S.) 1233; 1 Remington on Bankruptcy, § 1383; 1 Loveland on Bankruptcy, § 499; In re Sturtevant, 188 Fed. 196, 110 C. C. A. 68.

But, however this may be, we have found, and have been cited to, no case which has gone so far as to hold that "recording or registering" is deemed to be "required," unless failure to record or register will invalidate the transfer as to some one. In other words, the trans-

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fer must at least come within the operation of some recording act; and the perfectly well understood purpose of such acts is to give notice to certain persons or classes of persons of the transactions evidenced by recordable instruments, the effect of failure to record being to render the transfer invalid as against such persons, if without other notice.

With this rule in mind, let us examine our statute. It provides:

"Every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration: Provided, that this section shall not apply to debts evidenced by writing subscribed by the debtor, and delivered to the assignee at the time of the assignment thereof. Assignments required by this section to be filed need not be acknowledged."

This statute is not a recording act. Under its provisions a written assignment which is not "filed" is placed in a class with oral assignments. Though not filed, the assignment nevertheless dates from its actual execution, and its validity as against the whole world depends, not upon its *filing,* but upon its inherent character. No substantive rights, either of the parties to the assignment, or of subsequent assignees, or of the debtor, in case, without actual notice, he pays the assignor, or of creditors, are affected either by the *filing* or the failure to *file.* In short, this act provides a mere rule of evidence (see Burton v. Gage, 85 Minn. 355, 88 N. W. 997; Baylor v. Butterfass, 82 Minn. 21, 84 N. W. 640), just as does the section next succeeding it (see Thorpe v. Pennock Mercantile Co. 99 Minn. 22, 108 N. W. 940, 9 An. Cas. 229). Such being the case, we hold that R. L. 1905, § 3502, does not "require" a "recording or registering" within the meaning of the bankruptcy act, and hence that the assignment here involved, having been made more than four months prior to the filing of the petition in bankruptcy, cannot be avoided as a preference under section 60, subds. "a," "b."

Order reversed.

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H. ARCHER v. JOHN A. WHITTEN.[1]

February 7, 1913.

Nos. 17,828—(176).

New trial — discretion of court.

The trial court did not abuse its discretion in granting a new trial on the ground of newly discovered evidence.

After the former appeal reported in 117 Minn. 122, 134 N. W. 508, defendant moved for a new trial upon the ground of material evidence newly discovered, which could not have been found and produced at the trial. The motion was heard before Dickinson, J., who granted it. From the order granting a new trial, plaintiff appealed. Affirmed.

William A. Tautges and *Louis A. Hubachek,* for appellant.

Albert H. Hall, M. H. Boutelle and *A. M. Higgins,* for respondent.

BUNN, J.

This is an appeal from an order of the district court of Hennepin county granting defendant's motion for a new trial made on the ground of newly discovered evidence.

The case was before us at the October, 1911, term on an appeal by defendant from an order denying his motion for judgment notwithstanding the verdict or for a new trial, and the order was affirmed. Archer v. Whitten, 117 Minn. 122, 134 N. W. 508. In response to a request that we remand the case, with permission to defendant to move for a new trial on the ground of newly discovered evidence, we stated in the opinion that "the whole matter of leave to make such motion, as well as its decision, rests with the trial court." The trial court entertained the motion, as it clearly had the power to do, and granted it. We are now asked to hold that this was an abuse of discretion.

[1] Reported in 139 N. W. 815.

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The question on the trial was whether an account was stated between the parties on May 20, 1910. The newly discovered evidence is a letter written by plaintiff to defendant on July 14, 1910, claimed to be an admission by plaintiff that the matters of difference between him and defendant were then unsettled. It is unnecessary to state the contents of this letter, further than to say that it appears to us to be material evidence on the pivotal question in the case. Indeed, unless plaintiff's explanation should be found sufficient to destroy or materially affect its weight, it would be likely to change the result on a new trial. While the letter was cumulative evidence, in the sense that evidence on the issue had been received at the trial, we think this fact insufficient to show an abuse of discretion. The rule that the new evidence must not be merely cumulative, contradictory, or impeaching is not inflexible, and we think it was within the discretion of the trial court to relax it in this case. Hanson v. Bailey, 96 Minn. 274, 104 N. W. 969.

A more doubtful question is whether defendant made a sufficient showing that the existence of the letter could not have been discovered before the trial by the exercise of reasonable diligence. The letter was received July 15, 1910. The trial was April 27, 1911. In substance plaintiff swears that prior to the trial he searched in all places and receptacles for papers that he had, for all data, memoranda, papers, and letters relating to the case, and produced at the trial all those found; that he had no recollection of the receipt of the letter in question until he discovered it accidently on January 25, 1912, in a bundle of receipted bills of a hotel of which he was the proprietor, contained in a box of odds and ends of the hotel property; that he had never tied up the bundle, or put away the papers where they were found, and had no knowledge that they were there, or how they came to be there.

We think this is more than a showing that the existence of the evidence was forgotten. We approve the rule that a new trial on the ground of newly discovered evidence should not ordinarily be granted, when it appears that the only reason for not producing the evidence on the trial is that its existence was forgotten. But in this case we have a showing of a pretty thorough search for all papers

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relating to the controversy, and a reasonable excuse for failing to discover this letter. On the peculiar facts here, we are of the opinion, and so hold, that the trial court did not abuse its discretion in granting the new trial.

Order affirmed.

HOLT, J., having tried the case in the court below, took no part.

WILLIAM WELLENDORF and Another v. LOUISA WELLENDORF.[1]

February 7, 1913.

Nos. 17,861—(175).

Assignment of mortgage — recorded after death of assignor.

An assignment of a mortgage upon real property, though not recorded until after the death of the assignor, is valid and superior to the rights of the heirs of the assignor, who are not, within the recording act, in the position of subsequent bona fide purchasers.

Unacknowledged assignment.

An unacknowledged assignment of a mortgage is valid between the parties; the acknowledgment thereof being essential only to entitle it to record.

Evidence.

Evidence *held* insufficient to justify a finding that the assignment above referred to was obtained by fraud or undue influence.

Action in the district court for Scott county by William Wellendorf and F. E. Logelin, as administrator of the estate of John Wellendorf, deceased, with the will annexed, to adjudge that a certain mortgage and the debt secured thereby were the property of decedent at the time of his death, and that the assignment thereof from him to defendant and the record thereof be declared fraudulent and annulled. The case was tried before Morrison, J., who at the close of

[1] Reported in 139 N. W. 812.

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plaintiff's case granted defendant's motion to dismiss the action. From an order denying a new trial, plaintiffs appealed. Affirmed.

F. C. Irwin, for appellants.

Peck & Moriarty, for respondent.

BROWN, C. J.

Action to set aside and discharge of record an assignment of a real estate mortgage, in which, at the close of the trial below, an order of dismissal for the failure of plaintiff to establish a cause of action was entered, and plaintiffs appealed from an order denying a new trial.

It appears that John Wellendorf was in his lifetime the owner of a real estate mortgage securing the payment of $900, which was duly recorded in the office of the register of deeds. By an instrument in writing he assigned the mortgage to defendant, his wife, and the assignment was, after the death of Wellendorf, duly recorded. Defendant was the second wife of Wellendorf, and plaintiff William Wellendorf is a son of the first marriage, and the sole surviving heir of his father's estate. Wellendorf and defendant were duly married some time in the year 1901, and thereafter continued to reside together as husband and wife until the time of his death, which occurred on June 25, 1911. He was at that time 81 years of age. He executed the assignment of the mortgage on March 2, 1911. The complaint alleges the execution of the instrument, the record thereof after the death of Wellendorf, and charges that the execution thereof was obtained by fraud and undue influence, and by taking advantage of the enfeebled mental and physical condition of Wellendorf. The answer put these allegations in issue.

Plaintiffs offered in evidence on the trial the record of the mortgage, the assignment thereof to defendant, and the record of an antenuptial contract between Wellendorf and defendant, entered into prior to and in consideration of the marriage; also notice of lis pendens in the action. Defendant was then called for cross-examination, and the fact of, and circumstances surrounding, the execution of the assignment of the mortgage, were brought out. Defendant testified that she took the mortgage to a banker in the village of

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the residence of the parties and requested him to draw an assignment from Wellendorf to her; that the assignment was written out, and she returned with it to her home, where her husband signed it. Defendant afterwards returned to the banker, and he then, but not in the presence of Wellendorf, or pursuant to any authority from or communication with him, attached an acknowledgment in due form of law, and signed the instrument as a witness. A clerk in the bank also signed as a witness. Neither was, however, in fact a witness to the signature of Wellendorf. Defendant also testified that Wellendorf was not at the time in good health, that he was gradually failing, but was "pretty well at that time." She further testified that she placed the assignment in a box in which family papers were kept, where it remained until after the death of Wellendorf, some three months later, when she caused it to be recorded. With this evidence plaintiffs rested their case. There was no evidence of undue influence, none of mental incapacity on the part of Wellendorf, nor that defendant procured her husband to assign the mortgage by any acts of misrepresentation or fraud. For aught that appears, the assignment was the voluntary act of Wellendorf, though it does not appear that any consideration therefor was paid by defendant.

In this situation of the pleadings and evidence it is clear that a cause of action was not established, and the trial court rightly dismissed the action. The contention that the evidence would sustain a finding that the assignment was not executed by Wellendorf is not sustained. While it is true that it was not acknowledged by him in the manner required by law to entitle it to record, as between the parties such acknowledgment was not essential to the validity of the instrument as an assignment of the mortgage (1 Dunnell, Minn. Dig. 15; Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14), though to entitle it to record a proper acknowledgment was necessary. And it was valid, though not recorded until after the death of Wellendorf. Collup v. Smith, 89 Va. 258, 15 S. E. 584. An heir or legatee does not come within the recording act as a bone fide purchaser.

The further contentions that there was no delivery of the assignment, or valuable consideration paid therefor, are not sustained. The question of delivery was not an issue under the complaint, and

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the evidence is silent upon the question of consideration. The court cannot well presume that the assignment was not delivered, or that it was without consideration. The burden of proof was upon plaintiffs, and the evidence offered is wholly silent upon both questions. The antenuptial contract has no pertinent bearing upon the questions involved in the action. The purpose of that contract was to reserve to each party their property and property rights, precisely as though no marriage took place between them, and each thereby reserved the right to sell and dispose of his or her separate property free from any claims on the part of the other. Clearly Wellendorf had the right to sell or give the mortgage to his wife, and he was not prevented from so doing by that contract.

Our conclusions, therefore, are in harmony with those of the learned trial court, and the order appealed from is affirmed.

AUGUST AMMON v. ILLINOIS CENTRAL RAILROAD COMPANY and Another.[1]

February 7, 1913.

Nos. 17,871—(189).

Consignment of freight — notice to be given to third persons — vendor's lien.

1. Where goods are shipped by carrier, the consignee is presumed to be the owner. A direction in the bill of lading to "notify" a third party does not make such party the consignee, nor does it give rise to any presumption that he is the owner. The presumption of ownership in the consignee may be rebutted by proof of a completed sale to the party to be notified before the shipment. In such case, if the price is not paid, the vendor holds a vendor's lien until payment or delivery. If he consigns the goods to himself, the effect is to simply preserve such vendor's lien.

Evidence of negligence.

2. Evidence that goods are loaded in good condition, that their character

[1] Reported in 139 N. W. 819.

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was such that if properly handled they would have gone without damage to their destination, and that they in fact arrived there in damaged condition, is presumptive evidence of negligence. The evidence on the part of defendant in this case does not overcome such presumptive showing.

Refreshing recollection of witness.

3. Where the witness of one party testifies from a properly verified memorandum as to facts of which he has no present recollection, the adverse party may offer such memorandum in evidence. In this case the memorandum was not returned to this court. It was offered on cross-examination solely for the purpose of showing that it was not a book of original entry, and not made by the witness, though he verified its correctness. It was in fact submitted to the court. *Held* no prejudicial error was made to appear. It is not necessary that a memorandum so used by a witness should be a book of original entry, or that it should have been made by the witness, if he can verify its correctness.

Action in the municipal court of St. Paul against the Illinois Central Railroad Company and Minneapolis & St. Louis Railroad Company to recover $214.27. The complaint alleged that each of defendants neglected to transport the shipment in question within a reasonable time as agreed, but negligently delayed the transportation thereof and allowed it to become wilted, decayed and damaged. In its separate answer the Minneapolis & St. Louis Railroad Company denied the allegations of the complaint. In its separate answer the Illinois Central Railroad Company denied the foregoing allegations of the complaint and alleged that, if the shipment was in any manner in a damaged condition on arrival, it was due to the inherent defective and perishable character of the vegetables themselves, and to the negligence of the shipper or owner in not promptly loading the shipment when the car was ordered therefor. The new allegations in the latter answer were denied. The case was tried before Finehout, J., who made findings and ordered judgment in favor of plaintiff for $182.45. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Butler & Mitchell, S. G. Ordway and *Eugene Bryan,* for appellants.

T. P. McNamara, for respondent.

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HALLAM, J.

This is an action brought to recover damages to vegetables in transit from Crystal Springs, Mississippi, to St. Paul. The case was tried by the court without a jury. The court gave judgment for plaintiff. Defendants appeal from the judgment. Appellants assign three grounds of error:

1. That respondent was not the owner of the goods at the time they were damaged.

2. That there is no evidence of any negligence on the part of appellant.

3. That a certain account book used as a memorandum on the trial should have been received in evidence.

We will consider these contentions in order.

1. Of course respondent cannot recover unless he was the owner of the property when the damage was done; that is, during the transit. The vegetables were purchased by him from one Hutchinson at Crystal Springs, Mississippi. They were consigned by Hutchinson to himself, with direction to "notify August Ammon." Hutchinson made a draft on respondent for the price, attached the bill of lading, and forwarded the same through a bank. Respondent paid the draft and the freight, and received the goods. Of course these facts alone do not make proof that the title was in respondent during transit. The consignee of a shipment is presumed to be the owner of it. The possession of the carrier is presumptively his possession. The person to be notified is not the consignee, and is not presumed to be the owner, even though a draft is made on him with the bill of lading attached and the same are forwarded together with instruction to make delivery on payment of the draft. North Penn. Ry. Co. v. Commercial Bank of Chicago, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. ed. 287. But the presumption that the consignee is the owner is not absolute. It was perfectly competent for respondent to rebut this presumption, and to prove that he bought this car of vegetables before it was shipped. This is precisely what his evidence shows that he did. If he bought the same, as he claimed, the title passed, even though there was no payment or delivery, and the vendor merely held a lien until delivery, to secure payment of the price. Rail

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v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471. The evidence supports the finding of the court that respondent was the owner of the goods when they were shipped from Crystal Springs, Mississippi.

2. The court found that the vegetables were damaged by negligence of defendants. The evidence sustains this finding. The goods were shipped in a refrigerator car. There was evidence that the goods were loaded promptly on arrival of the car at Crystal Springs, that they were then in good condition, and that, if properly handled, they would have gone without damage to any market in the United States. They arrived in St. Paul in a damaged condition. This is presumptive evidence of negligence. Mahoney v. St. Paul, M. & M. Ry. Co., 35 Minn. 361, 29 N. W. 6; Whitaker v. Chicago, St. P. M. & O. Ry. Co., 115 Minn. 140, 131 N. W. 1061. Appellants offered evidence to prove proper icing, but the force of this evidence is weakened by further evidence from some of appellants' witnesses that when the train arrived at Canton, Mississippi, the ice bunkers were empty, and that in such case proper care requires that the car be run into the icing station and ventilated. There is no claim that this was done. The evidence is plainly sufficient to sustain the finding of negligence.

3. The respondent gave some testimony as to the amount realized from the sale of the vegetables, using an account book as a memorandum. Counsel for appellants on cross-examination asked that the book be received in evidence. In offering it he said: "The purpose is to show that the witness is testifying from a book that is not a book of original entry, and is simply a memorandum made by some other person." We are of the opinion that there is here no prejudicial error.

We do not wish to be understood as holding that a memorandum used by the witness of one party may not be offered in evidence on cross-examination by the adverse party. A memorandum may be used to quicken the memory of a witness, so that at last he testifies from his own recollection as refreshed and quickened; or it may be used where the witness has no independent recollection of the facts, even after seeing it, but recollects having seen it before, and remem-

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bers that at the time he saw it he knew the contents to be correct. 1 Greenleaf, Evidence, § 437; Culver v. Scott & Holston Lumber Co. 53 Minn. 360, 365, 55 N. W. 552; 1 Wigmore, Evidence, § 725, et seq.

The memorandum here used is within the latter class. We believe the better opinion is that, when a memorandum is so used, it may be offered in evidence by the adverse party. 1 Wigmore, Evidence, § 754; Mt. Terry v. White, 10 S. D. 620, 74 N. W. 1060. This memorandum should have been received, but it has not been made to appear that the error in rejecting it prejudiced any substantial right of appellants, and for several reasons:

First. The document has not been made a part of the settled case and is not returned to this court. We cannot accordingly rule upon its propriety as a memorandum. Johnson v. Howard, 51 Minn. 170, 53 N. W. 363; Carlton v. Carey, 83 Minn. 232, 86 N. W. 85.

Second. It does appear, however, that the purpose of offering it was to show that it was not a proper memorandum, because not a book of original entry, and because not made by the witness. Neither requirement was necessary to its use as a memorandum. It is not essential that a memorandum used by a witness should be a book of original entry, or that it should have been made by the witness, if he saw it while the facts were fresh in his mind and can verify its correctness.

Third. It further appears that the memorandum was submitted to the inspection of the court, the case was tried by the court without a jury, and, so far as appears, the court could determine its propriety as a memorandum as effectually as though it had been formally received in evidence. See Commonwealth v. Jeffs, 132 Mass. 5; 1 Wigmore, Evidence, § 754, and cases cited.

Judgment affirmed.

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ENOCH OPPEGAARD and Others v. BOARD OF COMMISSIONERS OF RENVILLE COUNTY.[1]

February 7, 1913.

Nos. 17,899—(167).

Change of school district — jurisdiction of district court to modify order.

Where, upon a petition, filed under the proviso of Laws 1907, c. 188, for the enlargement of a school district, the county board in rearranging the districts affected by the change, included in one of the districts land situated in another, under the belief that the same already belonged to the former, such land, furthermore, not being mentioned in either the petition or the notice of hearing, and there being no appearance at the hearing in behalf of the district to which the land belonged, the action of the district court, on appeal from the order of the board, in modifying such order by omitting therefrom the land thus erroneously included therein, did not constitute an excess of jurisdiction, as being a usurpation of legislative power or otherwise; the action of the board with reference to such land being a mere nullity.

Who are legal voters.

The term "legal voters," as used in the proviso of Laws 1907, c. 188, defining who may petition in certain cases for an enlargement of a school district, must be taken in its ordinary and usual sense, and hence does not include women.

Enoch Oppegaard and others appealed to the district court for Renville county from an order of the board of county commissioners of Renville county in the matter of a petition affecting Independent School District No. 40 and common school districts Nos. 35, 41, 43, 94 and 128, on the ground (1) that the county board had no jurisdiction to act; (2) that the county board had exceeded its jurisdiction; and (3) that its action was against the best interests of the territory affected. The board of county commissioners filed its com-

[1] Reported in 139 N. W. 949.

Note.—The question of the right of women to vote generally is considered in notes in 21 L.R.A. 662 and 27 L.R.A.(N.S.) 522.

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plaint in the district court. Appellants for their answer to the complaint alleged that, in making the order appealed from, the defendant board exceeded their authority and jurisdiction, and included therein lands which were a part of common school district No. 131, and no notice of hearing was posted in that district or ever served upon the clerk thereof or any of the officers therein, and that the district had no notice or knowledge of the hearing.

The appeal was heard before Powers, J., who denied a motion to dismiss the appeal, made findings and affirmed the order of the defendant board, except that the east half of the northeast quarter of section 21, township 116, range 37, should not be included as a part of common school district No. 43, for the reason that it was a part of school district No. 131, and ordered judgment in accordance with the findings. From an order denying defendant's motion for a new trial, Enoch Oppegaard and others appealed. Affirmed.

Daly & Barnard, for appellants.

J. M. Freeman, for respondent.

PHILIP E. BROWN, J.

1. In the year 1908 certain legal voters residing in Sacred Heart, an incorporated village of not over 2,000 inhabitants and situated in school district No. 40, county of Renville, petitioned the county board, under the proviso of Laws 1907, p. 212, c. 188, for an enlargement of such district. The petition and notice of hearing thereon contained, among other things, a description of the territory sought to be added; but, at the time stated, a certain 80 acres of land, hereafter referred to, was a part of school district No. 131 of the same county, and this land was not included in either the petition or the notice of hearing; neither was any appearance made by district No. 131 on the subsequent hearing. The board, however, in rearranging the districts affected by the change, nevertheless included this 80 in district No. 43, believing that the same was already a part thereof.

On the subsequent appeal from the order of the board granting the petition, the district court affirmed the order, excluding, however, from its operation the 80 above referred to, and on the appeal to this court the appellants, on this branch of the case, raise the question

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whether the district court had authority thus to modify the order; their contention being that the district court's power was limited to a review of the action of the board as a whole, with no authority to alter or modify the same if found to be partially erroneous, and that in excluding the 80 as above stated it exceeded its powers and usurped legislative functions. This contention cannot be sustained.

The board's action in including this 80 in its order was without vitality, no jurisdiction having been acquired by it to deal therewith, and its determination with regard thereto was subject to attack in any subsequent action or proceeding. Hence no legislative power was assumed by the district court, because in legal contemplation the 80 was never included in the order; void action being equivalent to no action. All that the district court did was to prune off the dead limbs.

2. The principal question raised by the appellants relates to the sufficiency of the petition in the matter of signatures. R. L. 1905, c. 14, § 1281 et seq., provides for the formation of school districts on petition made to the county board by "a majority of the freeholders, qualified to vote for school officers, residing upon any territory" sought to be incorporated in a district, after notice and hearing, etc. Section 1286 provides that upon petition of "a majority of the freeholders of each district affected, qualified to vote at school meetings," and by like proceedings, the boundaries of a district may be changed. This section was carried into Laws 1907, p. 212, c. 188, without change, except by the addition of a proviso to the effect that, where a district contains a village of 2,000 inhabitants or less, it may be enlarged upon the petition of a "majority of the legal voters residing within such school district," etc.

In the instant case a majority of the male voters of district No. 40 filed a petition in due form for its enlargement; but such petition did not contain the signatures of a majority of all the voters, male and female, of the district, entitled to vote for school officers and upon educational measures, and the appellants claim that it was therefore insufficient.

Before entering upon a discussion of this question the exact point in controversy must be clearly understood. The appellants found

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their claims upon the following constitutional provision giving women the right to vote upon certain matters. Const. Art. 7, § 8, provides:

"Women may vote for school officers and members of library boards, and shall be eligible to hold any office pertaining to the management of schools or libraries. Any woman of the age of twenty-one years and upward, and possessing the qualifications requisite to a male voter, may vote at any election held for the purpose of choosing any officers of schools or any members of library boards, or upon any measure relating to schools or libraries, and shall be eligible to hold any office pertaining to the management of schools and libraries."

Now, while this provision may be important in a collateral way, which we will consider later, it is clearly not directly relevant on the concrete question now to be decided, for we have here no question as to the right of women to vote. That question is absolutely determined by the Constitution in plain and clear language.

The precise question before us is: Did the legislature, by using the term "legal voters" in the proviso under consideration, intend to include women, notwithstanding that the subject-matter of the legislation did not involve any election of any kind whatsoever, or any question or measure to be voted for by any one, but related merely to the matter of petitioning the county board to grant a hearing upon the question of increasing the territory of a school district?

At the outset it must be conceded that in this state the ordinary acceptation of the words "legal voters" does not include women. As said by Mr. Justice Mitchell in Slingerland v. Norton, 59 Minn. 351, 357, 61 N. W. 322, referring to the status of women in this regard: "They are voters only for the purpose of electing school officers, and hence are electors only in a limited or qualified sense." We do not mean to say, nor do we think Mr. Justice Mitchell meant to say, that there may not be educational matters other than elections of school officers upon which women, under the Constitution, would be entitled to vote. We mean that in this state women are considered

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to be voters only in a qualified sense, and that the term "legal voters," without more, does not include women.

Now R. L. 1905, § 5513, provides that words and phrases not especially defined shall be construed according to the common and approved usage of the language, but technical or other words and phrases, which have acquired a peculiar meaning in the law, shall be given such meaning. See, also, 3 Dunnell, Minn. Dig. § 8968. So, also, in section 8975, the rule is stated as follows: "Words in a statute which have a settled meaning in the law are to be given that meaning unless they were obviously used in a different sense." To the same effect are the rules of statutory construction that language which is plain and unambiguous requires no construction; that if the language embodies a definite meaning, and involves no absurdity or contradiction, literal enforcement is required, the statute being "its own best expositor;" that courts should not nullify obvious requirements by construction; that extrinsic facts can be resorted to in aid of construction only where the intent cannot clearly be ascertained from the statute; and that when we ascertain the true sense of words, the same being their apparent and obvious meaning, we should not seek for others. See 3 Dunnell, Minn. Dig. § 8938.

Unless, therefore, it is apparent that the legislature, when it said "legal voters," did not mean legal voters as ordinarily and properly understood in this state, but intended to include also persons who are legal voters in a qualified sense only, the appellants' contention cannot be sustained, and in a sense it may be said that the appellants had the burden of showing that the legislature did not mean what it literally said.

Let us, then, examine their position. Their claim, so far as it is based upon the Constitution is, we think, plainly untenable, for it involves the fallacy that because the people, by the constitutional provision above referred to, gave women, in plain terms, the right to vote, the legislature must be deemed, therefore, to have given them the right to petition the county board upon a matter claimed to be the same as those covered by the constitutional provision, though the language of the statute does not in terms so provide. In other words, we are not impressed with the argument, if such is intended by the

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appellants, that the term "legal voters," as used in the statute declaring who may *petition* the board upon a matter which may here be conceded to concern education, must be held to include all persons who are qualified by the Constitution to *vote* upon educational measures.

The greatest effect that can be given to the constitutional provision, so far as concerns the question before us, is to concede that it indicates a general policy of giving women an equal voice with men in matters purely educational. The question in controversy must, therefore, be determined from the statute itself, though, of course, it is proper to bear in mind any general policy that may be indicated either by the Constitution or other statutes. In the first, and general, portion of the statute, provision is made for the procedure to change the boundaries of school districts in general, and the qualifications of those authorized to petition upon such matters is that they shall be "free-holders qualified to vote at school meetings;" the right of women to vote as conferred by the Constitution being thus qualified by the requirement that they should be "freeholders." In the second, and concrete, portion of the statute, by way of proviso, the right to petition in cases like the one before us is given to "legal voters residing within such school district."

Now, why should the legislature, under the first provision, exclude women unless they are freeholders, and, under the second, give them the general right to petition, whether they are freeholders or not? Certainly it could not be contended that the term "legal voters," as used in the second provision, is synonymous with the whole of the language of the first portion defining the qualifications of petitioners. But, if not, then what warrant is there for leaving off the requirement as to being freeholders? If we are to interpolate the language of the first provision into the second, it would seem that we would have to include all of it. But, this aside, what reasonable explanation can be suggested why the legislature, in declaring who might petition under the first provision, used the phrase "qualified to vote at school meetings," but failed to use it or equivalent language in the portion of the statute here involved? And why, if the appellants' contention is sound, did the legislature, in defining the

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qualifications of petitioners under the proviso, use the words "residing within such school district," instead of the words "of the district"? If the act had been thus worded, there would, we think, be better ground for the appellants' contention, or, at least, the question would be more open to debate. Why should we read into the proviso the words "qualified to vote at school meetings," when the legislature, having used them in the main portion of the statute, left them out in the proviso? Why should we say that the words "legal voters" mean, in the connection used, something different from their ordinary and universally accepted meaning?

We should bear in mind that the sole purpose of the petition is to bring the matter before the board for consideration and determination by it, and that at the hearing which must be had the board must hear all evidence, objections, and contentions relevant to the inquiry, but ultimately must determine the question. Gerber v. Board of Commrs. of Wright County, 89 Minn. 351, 94 N. W. 886. The analogy of the constitutional provision giving women the right to vote on educational measures is not, therefore, of much force, and aside from this there is absolutely nothing to indicate that the term "legal voters" was not used in its usual sense, except that under the main and general portion of the statute women are expressly given the right to petition, which alone is, we think, very far short of being sufficient to justify us in declaring that the legislature meant anything except exactly what they literally said.

There is absolutely nothing in the cases cited by the appellants which militates against this conclusion. Indeed, they can hardly be said to be in point. We will, however, refer briefly to three of them.

In Jordan v. Freeborn, 149 Wis. 159, 135 N. W. 751, it was held that the words "adult owners of land" within a drainage district included corporate owners, which holding, so far as this case is concerned, is pertinent only to the proposition that the context and the subject-matter may and should be considered in determining the meaning of terms used in a statute, a proposition which we are not at all inclined to dispute; but it is a far cry from that holding to the contention here made.

In Olive v. School District, 86 Neb. 135, 125 N. W. 141, 27

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L.R.A.(N.S.) 522, the only questions decided, or even discussed, were that under a statute expressly authorizing women to vote "at any district meeting," women might vote at a "school district meeting" upon the question of a school bond issue, and that such provision was not contrary to a constitutional provision defining "electors" as including men only. "There is no provision in the Constitution," said the court, "that the legislature or the agencies created by statute for the purpose of carrying out the mandate of the people shall not provide means for educating the children of school age in the respective districts unless the voters resident therein shall have authorized the levy of taxes or the creation of a debt for that purpose." Even aside from the fact that the matter involved in that case was *voting* and not *petitioning,* we fail to see how the case is at all in point here.

Finally, in Hall v. Madison, 128 Wis. 132, 107 N. W. 31, it was held: (1) That a *vote* upon a school bond issue was an "election pertaining to school matters," under a statute giving women the right of suffrage in school matters; and (2) that, as this statute in practical effect was a part of the Constitution, the word "electors," as used in a subsequent statute providing that a municipal bond issue should be submitted to the "electors," would be presumed to include women, to whom a general right of suffrage in school matters had been given, when the election was upon the question of a bond issue to build a schoolhouse.

If the question here were upon the right of women to *vote* upon some school measure, under a statute providing for the submission of such matter to the "legal voters" at an election, it might be that the case cited would be in point to the proposition that under our Constitution women would have to be accorded the right to vote in order to save the statute. But such is not the case here. The holding of the case cited, furthermore, is considerably weakened by the strong and able dissent of Mr. Justice Marshall.

We are opposed to reading into a statute, under the guise of arriving at the intention of the legislature, any words or meaning not therein included or clearly thereby intended. Words must at times be supplied, and meaning other than that literally expressed must

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sometimes be inferred; but, if possible, the intent of the lawmakers must be gathered from the exact words used by them, especially when the same are clear and unambiguous, and we may not ordinarily declare such intent to be what from other considerations it may be thought or guessed to be. Our knowledge of the views held by the bar generally concerning the construction of the statute in question, as well as the frequency of resort thereto, and likewise as to the financial obligations which may have been incurred thereunder, is limited; but we know that, aside from the instant controversy, the appellants' contentions are by no means universally conceded. We think, furthermore, that it would be our duty to be very slow to give this act a construction which would avoid contracts affecting school districts enlarged under the act in the manner adopted in the instant case, and the question now before us should be ruled by the same considerations.

All true men are disinclined to restrict women in the exercise of any civil right which, after long and unjust denial, has been restored to them. Whether this results from consciousness of tardy reparation, or from a belief, entertained by many, that full justice has not yet been accorded, or from what other causes that may be, we need not here stop to inquire; but we must refuse to usurp the functions of the legislature in order to confer by indirection a privilege which we cannot fairly say under the legitimate rules of statutory construction has been granted.

Order affirmed.

E. M. WILSON v. W. J. HOY.[1]

February 7, 1913.

Nos. 17,907—(180).

Damages — finding not sustained by evidence.

In this action to recover damages for the breach of the vendee of an alleged contract for the sale of real estate it is *held*, conceding that a valid contract

[1] Reported in 139 N. W. 817.

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was made and broken, the evidence does not sustain the finding that plaintiff was damaged in the amount found by the trial court, or in any amount.

Measure of damages.

The measure of damages in such a case is the difference between the contract price and the actual or market value of the land at the time of the breach, and not the difference between the contract price and the cost of the property to the vendor.

Action in the municipal court of St. Paul to recover $500 for breach of contract. The answer specifically denied that plaintiff ever purchased the premises described in the complaint or agreed to purchase them. The case was tried before Finehout, J., who made findings and ordered judgment in favor of plaintiff for $200. From an order denying his motion for a new trial, defendant appealed. Reversed and new trial granted.

Thomas J. McDermott, for appellant.

D. F. Peebles and *P. A. Cosgrove,* for respondent.

BUNN, J.

This is an action to recover damages for the breach by defendant of an alleged contract to purchase certain real estate. The issues under the pleadings were: (1) Was a valid contract entered into? (2) If so, what were the damages to plaintiff by its breach? The trial was by the court without a jury, and resulted in a decision that the contract was made and broken by defendant, and that plaintiff was damaged in the sum of $200. Defendant appeals from an order refusing a new trial.

The questions here are as to the sufficiency of the evidence to sustain the decision of the trial court on the two issues tried. The facts are these: Ella A. Sanders owned the land. On January 25, 1911, she and plaintiff entered into a written contract, by the terms of which she agreed to sell and plaintiff to purchase the property at a price of $10,000. In June, 1911, plaintiff, through an agent, offered to sell the land to defendant for $10,500. Defendant offered to give $10,200, but the offer was refused. On June 28, plaintiff and defendant met. The testimony of plaintiff and his agent was to the effect that orally plaintiff agreed to sell and defendant to purchase for $10,200. Plaintiff had a contract already prepared in duplicate,

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and testified that he handed both copies to defendant, who read them and said it was all right. Defendant denied that he orally agreed to purchase the property, or that he said it was all right, and claimed that he handed the copies of the written contract back to plaintiff, telling him he would let him know the next morning. It is admitted that the next morning defendant refused to take the property.

Were the question simply as to whether there was an oral contract between the parties for the sale of the land, it would be easy to hold that the finding that a contract was made is sustained by the evidence. But the contract was required by our statute to be in writing, subscribed by the party by whom the sale was made. The question, therefore, was whether there was a written contract that complied with the statute of frauds. A contract for the sale of land cannot rest partly in writing and partly in parol. It is not, however, necessary that the written contract be signed by the purchaser. It is sufficient if it is signed by the vendor, delivered to the purchaser, and accepted by him. We are left in doubt by the memorandum of the trial court whether its finding that a contract was made was based on the testimony as to the oral agreement of the parties, or upon the delivery to and acceptance by defendant of the copies of the written contract, after an oral offer to take the property at the price named. As we feel obliged to order a new trial on another ground, we deem it unnecessary to decide whether the evidence would sustain a finding that there was a written contract, signed by plaintiff and accepted by defendant.

We may say, however, that the evidence in support of such a finding does not impress us very strongly. The alleged written contract recites that $500 of the purchase money has been paid, while there is no pretense that defendant paid anything as a down payment or earnest money. From its language, and the blank spaces left for signatures, it is evident that it was expected that the purchaser should sign. Why were both copies delivered to defendant, if the delivery was intended as a consummation of the contract, rather than for the purpose of enabling defendant to examine the papers, and to affix his signature to both copies if he agreed to the sale?

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1. The finding that plaintiff was damaged in the sum of $200 by defendant's breach of the contract is not sustained by the evidence, nor do we find any evidence showing damage in any amount. The finding that plaintiff was damaged in the sum of $200 was based upon the fact that the contract under which plaintiff purchased the property named $10,000 as the purchase price, while defendant agreed to pay plaintiff $10,200. There is not one word of evidence tending to show that the property was actually worth a cent less than $10,200, or that plaintiff could not have sold it for that, or a larger sum, or that he lost a sale between the afternoon of one day and the morning of the next. In an action for damages for breach of contract, the damages must be proved. It is not sufficient for the plaintiff or his witness, as was done in this case, to swear generally that plaintiff has been damaged in a certain amount. This was apparently recognized by the trial court, which fixed the damages at the difference between the price defendant is claimed to have agreed to pay and the price which plaintiff agreed to pay for the property six months before.

2. The proper measure of damages for a breach by the purchaser of a contract of purchase is the difference between the contract price and the actual or market value of the property at the time of the breach, including any expenses necessarily incurred by the vendor in his effort to carry out the contract. Under this rule, there was no evidence to sustain a recovery of more than nominal damages. The rule applied by the trial court has no support in reason or authority. Under such a rule, whenever a purchaser of real or personal property refuses to carry out his contract, the seller would be entitled to recover the difference between the contract price and the cost of the property to him. This is manifestly wrong.

Order reversed, and new trial granted.

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GILES C. PEAKE v. MILACA STATE BANK and Another.[1]

February 7, 1913.

Nos. 17,945—(185).

Malicious prosecution — evidence insufficient for directed verdict.

The evidence examined, and *held*, that defendants were not entitled to a directed verdict, on the ground that it fails to show that they were the cause of plaintiff's arrest and imprisonment, nor on the ground of failure to show that the prosecution was malicious and without probable cause.

Evidence.

The evidence conclusively shows that the prosecution was abandoned and terminated before this action was begun.

Question for jury.

The court was warranted in submitting to the jury whether or not defendants had fully and fairly stated all the facts to counsel and followed his advice in the bringing of the criminal prosecution, so as to constitute a good defense herein.

Action in the district court for Mille Lacs county to recover $5,000 for false imprisonment. The facts are stated in the opinion. The separate answer of defendant bank alleged, among other matters, that plaintiff and William C. Hopkins obtained the sum of $150 by color and aid of a worthless and fraudulent check, received said sum from the answering defendant, and after its receipt moved their business from Mille Lacs and their whereabouts was unknown to defendant until they were both arrested by the police of Duluth, which arrest was made under instructions from the authorities of Mille Lacs county, who held a warrant for their arrest; that de-

[1] Reported in 139 N. W. 813.

Note.—The authorities on the question when an action is sufficiently at an end to support a suit for malicious prosecution therefor are gathered in notes in 2 L.R.A.(N.S.) 928 and 39 L.R.A.(N.S.) 1215.

For advice of counsel as defense to action for malicious prosecution, see extensive note in 18 L.R.A.(N.S.) 49.

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fendant bank consulted Olin C. Myron, an attorney at law duly admitted to practice, and truly stated to him as its attorney all the facts of the case in anywise appertaining to procuring the $150 from defendant by means of the worthless draft, and thereupon that attorney directed defendant to make complaint to the justice of the peace. Except as stated, the other allegations of the complaint were denied. The case was tried before Taylor, J., who denied defendants' motion to direct a verdict in their favor and a jury which returned a verdict for $201. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

McDonald, Bernhagen & Patterson, for appellants.

Charles L. Lewis, J. H. Whiteley and *E. L. McMillan,* for respondent.

HOLT, J.

Action for false imprisonment and malicious prosecution, wherein plaintiff had a verdict, and defendants appeal.

It appears from the record that plaintiff and one William C. Hopkins were partners in the produce and commission business under the name of the Minnesota Produce Company, having one place of business in Duluth, in charge of plaintiff, and another at Milaca, in charge of Hopkins. The defendant West was the cashier of the defendant bank, located at Milaca. The firm did business with defendant bank, and on January 18, 1912, had overdrawn their account to the extent of about $150. To cover this overdraft Hopkins drew a sight draft on the Minnesota Produce Company at Duluth, payable to defendant bank, for $150. This the bank placed to the credit of the firm and sent to Duluth for collection. It was dishonored. Thereupon the defendant West, in behalf of the bank, consulted an attorney, with the result that criminal complaints were drawn, attempting to charge plaintiff and his partner with a violation of section 5080, R. L. 1905. The complaints were sworn to by West before a justice of the peace at Milaca, who issued warrants therein returnable before a justice of the peace at Princeton. When this was done, West communicated with Charles D. Brown, agent of the

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Minnesota Bankers Association, stating that the warrants had been issued and would be delivered to the sheriff for service. Brown then telephoned the chief of police of Duluth to arrest plaintiff, which was done. Some arrangement had been made between West and the sheriff of Mille Lacs county, under which the latter was to go to Duluth, take plaintiff into custody under the warrant, and bring him before the justice at Princeton. When the sheriff arrived at Duluth, he did not serve the warrant or take plaintiff into custody, whereupon the chief of police let him go. Plaintiff was in jail two days. In the meantime he had procured counsel, who rendered services seeking his release, which services were reasonably worth $200. The verdict was for $201.

The contention of defendants is that the verdict is not sustained, because (a) the evidence fails to connect defendants with the arrest and detention of plaintiff by the chief of police at Duluth; (b) the proceeding under which it is alleged that plaintiff was prosecuted maliciously and without probable cause has not been terminated; and (c) it conclusively appears that defendants, after a full and fair statement of all the facts to counsel, followed his advice in what was done.

Under the evidence we think it became a proper question for the jury whether or not the defendant West, who must also be held to have acted for the defendant bank, was the cause of plaintiff's arrest and detention in the Duluth jail; also whether or not the criminal prosecution was malicious and without probable cause. Plaintiff would not have been arrested by the police authorities in Duluth, but for the representation of West to Brown that the proper warrant had been issued. West was undoubtedly the moving party in the prosecution. It is not necessary to set out the evidence in detail.

It was conceded at the trial and on the argument here that the criminal complaint sworn to by West stated no offense. The warrant likewise, which embodied the complaint, showed the same fatal defect. The officer would undoubtedly be justified in refusing to serve it. We may assume that for that reason, if for none other, the sheriff, upon arriving in Duluth, did not serve the warrant or take plaintiff into custody. At any rate, the fair conclusion is that a crim-

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inal prosecution based on this fatally defective complaint was abandoned by the authorities when plaintiff was turned loose. Plaintiff has not had and cannot well have any opportunity to meet the charge made against him in that proceeding. There is no prospect that he will ever again be apprehended under the complaint made, and no return of the warrant issued is to be expected. Under the decision of Swensgaard v. Davis, 33 Minn. 368, 23 N. W. 543, we think the prosecution has terminated. See, also Leever v. Hamill, 57 Ind. 423; Page v. Citizens Banking Co. 111 Ga. 73, 36 S. E. 418, 51 L.R.A. 463, 78 Am. St. 144; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101; Strehlow v. Pettit, 96 Wis. 22, 71 N. W. 102. The uncontroverted facts show that the prosecution is ended, without the slightest hope of ever being revived.

As to the protection afforded by following the advice of counsel, we think the record makes it a fair question for the jury whether all the facts were fairly stated by Mr. West to Mr. Myron, his counsel. The court's charge in that respect was fair and lucid, and fully protected the rights of defendants. We conclude that the defendants have had a fair trial, and the verdict is scarcely sufficient to compensate plaintiff for the actual expenses incurred in seeking to obtain his liberty.

Order affirmed.

STATE ex rel. C. P. JOHNSON and Another v. DISTRICT COURT OF WASECA COUNTY and Others.[1]

February 7, 1913.

Nos. 18,034—(275).

Change of venue.

R. L. 1905, § 4096, providing that, if there are several defendants residing in different counties, the trial shall be had in the county upon which the

[1] Reported in 139 N. W. 947.

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majority of them unite in demanding does not authorize a change of venue in an action to which a municipal corporation is a party defendant from the county in which such municipality is located, though a majority of the individual defendants unite in demanding a change to the county of their residence.

C. P. Johnson and Carl P. Johnson obtained from this court an order directed to the district court for Waseca county, Hon. Arthur B. Childress, judge thereof, and the clerk thereof, to show cause why a peremptory writ of mandamus should not issue directing the officers above named to transfer the files and papers in the case of Dube v. City of Waseca, C. P. Johnson and Carl A. Johnson, copartners as C. P. Johnson & Son, from the district court for Waseca county to the district court for Hennepin county. The facts are stated in the opinion. The respondents made return and answer to the petition for the order to show cause, and moved to dismiss the order. Order discharged.

John Junell, for relators.

Senn & Gallagher and *Moonan & Moonan,* for respondents.

PHILIP E. BROWN, J.

Order to show cause why mandamus should not issue to compel the allowance of a change of venue. On September 12, 1912, the relators, who were then, and still are, residents of Minneapolis, were sued in Waseca county, together with the city of Waseca, for wrongful death. On October 2, 1912, the relators duly demanded a change of venue to Hennepin county, appearing specially for that purpose, and, the same having been denied, this order to show cause was obtained.

"The real issue in the matter before us," says counsel for relators, "is the question of whether or not a transitory action may be removed, as against a municipality, from the county in which that municipality is located, to the county of residence of the majority of the defendants." But in our opinion such is not the issue, for actions against municipalities are inherently local. Pack Woods & Co. v. Township, 62 Mich. 122, 28 N. W. 746; Jones v. Town, 97 N. C. 86, 2 S. E. 346; Oil City v. McAboy, 74 Pa. St. 249; City v.

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Superior Court, 4 Wash. 655, 30 Pac. 1053; City v. Fox, 60 Ohio St. 340, 54 N. E. 370; Heckscher v. Philadelphia (Pa.) 9 Atl. 281. This is the common-law rule, and we are satisfied that it has not, as claimed by the relators, been changed in this state.

R. L. 1905, §§ 4089, 4090, 4091, 4092, 4094, specifically provide that certain actions shall be local; section 4095 provides that "all actions not enumerated in [sections] 4089–4094 shall be tried in the county in which one or more of the defendants resided when the action was begun"; and section 4096 provides that, "if there are several defendants residing in different counties, the trial shall be had in the county upon which the majority of them unite in demanding, or, if the numbers be equal, in that whose county seat is nearest." It is upon these provisions that the relators rely, insisting that, as an action for tort against a municipality is not thereby made local, it must be deemed to be transitory. It is to be noted, however, even as asserted by the relators, that the statutory classification is based almost exclusively upon the nature of the action, and not upon the character of the defendant; and we do not think that from such a classification any intention is to be inferred to change the common-law rule as to actions against municipalities, the local character of which actions inheres in the very nature of the defendant.

Furthermore, section 4095 has no bearing upon the character of such an action, for under the same the venue in an action against a municipality may originally be laid in the county in which the municipality is situated, no matter how many individual defendants there may be. The venue, when so laid, however, would be subject to change under section 4096, if such section applies to an action to which a municipality is a party defendant, and this is the ultimate question to be determined in this case. We do not think this section so applies, for, as we have stated above, actions against municipalities must still be regarded as local. The presumption is "that the legislature, in the enactment of statutes, does not intend to overturn long-established principles of law, unless such intention is made to clearly appear either by express declaration or by necessary implication." In re Garcelon, 104 Cal. 570, 584, 38 Pac. 414, 417, 32 L.R.A. 595, 601, 43 Am. St. 134, 139; 3 Dunnell, Minn.

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Digest, 8958. And especially in a matter like the one in hand, in which every consideration of public policy leads to a contrary conclusion, an intention to change the common law will not be inferred, unless it is clearly made manifest.

In Phillips v. Baltimore, 110 Md. 431, 72 Atl. 902, 25 L.R.A. (N.S.) 711, it was held that the common law was not abrogated by the general acts relating to suits against corporations, though municipal corporations were not specifically excepted therefrom. "In our own state," said the court, at page 440, after reviewing authorities from other states, "Acts 1825, c. 114, authorized attachments to be laid 'in the hands of the plaintiff or of any other person or persons whatsoever, *corporate or sole*,' and in Mayor and City Council of Baltimore v. Root, 8 Md. 95, 103, the court held that the argument from inconvenience sanctioned the construction that the legislature did not design to include municipal corporations, and this has been the law of Maryland ever since. It is difficult to imagine any sound reason why this argument from inconvenience should forbid the process of attachment against a municipal corporation, while permitting it under any other form of process to be dragged from one end of the state to the other at great cost and inconvenience to the public, which constitutes the municipality. The magnitude and importance of the functions of municipal government are constantly increasing with the growth of population, and of the various and complex agencies employed in cities and towns in the public service, and these functions require the constant presence and watchfulness of those charged with their direction and management. To permit these great public duties to be hindered or delayed in their performance, in order that individuals or private corporations might more conveniently collect their private debts, would be to pervert the great object of the creation of municipal corporations."

Again, in Nashville v. Webb, 114 Tenn. 432, 85 S. W. 404, 4 An. Cas. 1169, it was held that, in view of the inherently local character of actions against municipalities, a statute authorizing counterpart summons to issue to any county where any of the defendants are most likely to be found, "where there are two or more defendants in any suit in courts of law or equity, or before justices of the peace,"

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did not authorize such a summons against a municipality. "It is true," said the court at pages 434, 435, [of 114 Tenn; at page 405 of 85 S. W., 4 Ann. Cas. 1169,] "there is no statute which makes an action brought against a municipal corporation a local action. * * * But actions against municipal corporations are inherently local. These bodies cannot change their situs or their place of abode. They cannot remove from one place to another, and sojourn for a time at this point or that. They remain stationary; hence they must be sued where they are found—that is, in the county of their location. It is a misnomer, a misapplication of terms to speak of an action against such a body as transitory, no matter what the ground may be on which the right of action rests. Such actions are not only inherently local, but it is of the greatest importance to the welfare of such bodies, and of the citizens whom they serve, that their officers should be permitted to remain at home and discharge their public duties, instead of being called hither and thither over different parts of the state to attend to litigation brought against the city through the agency of counterpart writs."

The statute construed in that case was certainly as broad as, if not, indeed, broader than, R. L. 1905, § 4096, and yet the court did not hesitate to declare that municipalities did not come within its operation. Nor can we hesitate to hold that section 4096 is inapplicable to actions to which a municipal corporation is a party defendant; for such is not only required by considerations of public policy, but also by both authority and reason.

It is likewise worthy of note that the general policy to regard actions against municipalities as local is reflected in our statutes relating to proceedings against public officers. See R. L. 1905, § 4090, making actions against public officers for official misconduct local, and section 4237, exempting municipal officers from the necessity of answering garnishee summons anywhere except in the municipality.

Order to show cause discharged.

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ÆTNA LIFE INSURANCE COMPANY v. FLOUR CITY ORNAMENTAL IRON WORKS.[1]

February 14, 1913.

Nos. 17,841—(181).

Refreshing recollection of witness.

Entries made by witnesses in a book kept by the plaintiff insurance company, and known as its liability policy register, *held* to constitute sufficient and proper memoranda for use by the witnesses in refreshing their recollection.

Reformation of policy — evidence.

Refusal of the trial court to grant reformation of an employer's liability insurance policy, so as to make it fully cover the amount paid by the insurance company upon a judgment against the insured in favor of an injured employee, and thus to defeat the insurance company's claim against the insured for the excess so paid over and above the face of the policy, *held* sustained by the evidence.

Finding sustained by evidence.

The trial court's finding as to the amount of indemnity called for by the policy, which had been destroyed by fire, *held* sustained by the evidence.

Evidence against party's contention.

The defendant's contention that the plaintiff was precluded from a recovery by its negligent failure to effect a settlement with the defendant's injured employee before suit and judgment on his claim *held* not sustained by the evidence.

Recovery of excess paid upon judgment.

The plaintiff insurance company, having paid the full amount of the judgment against the defendant, the insured, in favor of the latter's injured employee, in the mistaken belief that such amount was fully covered by the policy, was entitled to recover from the defendant the excess so paid over and above the amount of indemnity called for by the policy.

Action in the district court for Hennepin county to recover $2,687.07. The facts and a summary of the pleadings will be found

[1] Reported in 139 N. W. 955.

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in the opinion. The case was tried before Steele, J., who made findings in favor of plaintiff and ordered judgment in its favor for $2,558. From an order denying a new trial, defendant appealed. Affirmed.

A. B. Darelius, M. H. Boutelle and *N. H. Chase,* for appellant.
Bracelen & Cronin and *John D. O'Brien,* for respondent.

Philip E. Brown, J.

The complaint, summarized, alleged the plaintiff's corporate existence, and its issuance to the defendant, on March 5, 1906, of a policy of employer's liability insurance, for 36 months from its date, insuring the defendant, upon the conditions therein recited, against liability for accidents or injuries to its employees during the time stated; the plaintiff's maximum liability for any individual injury being fixed at the sum of $1,500. In 1907 Alexander Davidson, one of the defendant's employees, suffered an accidental injury covered by the policy, and brought an action to recover damages therefor against the defendant, which, after being defended by the plaintiff in accordance with the conditions of the policy, resulted in a judgment in favor of the employee for $4,132.72; that through inadvertence and mistake of fact, in that the plaintiff's agents and attorneys believed that the policy provided for the indemnification of the defendant up to the sum of $5,000 in each individual case of injury, the plaintiff paid the judgment in full. Relief was demanded by the plaintiff, on the theory that it was entitled to recover the excess over $1,500 so paid as the result of the mistake.

The defendant's answer admitted the matters recited in the complaint, except the claim of mistake on the part of the plaintiff in paying the judgment, and tendered, in substance, the following issues: (1) That the mistake, if any, made by the plaintiff was one of law, and not of fact; (2) that the plaintiff's payment of the judgment was voluntary, and made without the defendant's knowledge or request, either express or implied; (3) that, when the policy was negotiated, the defendant had applied for, and the plaintiff had accepted its proposition to, and also agreed to, issue a policy stipulating that in the event of each individual injury its liability should

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be to the amount of $5,000, but that the policy in fact issued, owing to the mutual mistake of the parties, failed correctly to express their intention in this regard, consequently the defendant was entitled to a decree reforming the instrument in accordance with such intention; (4) "that under the terms of the policy it was provided that the plaintiff should take charge and control of any and all claims thereunder arising, and that the assured should make no settlement of any claim, except upon its own responsibility; that, following the accident out of which the controversy arose, the injured employee had proposed and offered to settle with the defendant in full upon the payment of $350, and defendant had agreed to settle for that sum; that plaintiff's representatives were immediately communicated with and apprised of the matters stated; that defendant was informed by the latter that they had the matter in charge and would attend to it; that plaintiff's representatives in fact procrastinated in the handling and disposition of the matter, although repeatedly urged to take the same up for final disposition; that, after delaying for some time, plaintiff offered said injured employee the sum of $150 in full settlement of all claims against defendant for the injury mentioned; that the offer was declined, and the action, out of which the judgment in controversy grew, followed; that defendant relied upon the assurance of plaintiff that the arrangement made with its injured employee for the settlement of said loss would be attended to, and that the subsequent action, with the resulting judgment, resulted from the negligence of the plaintiff and its failure to exercise that degree of reasonable skill and diligence, in handling said settlement, imposed upon it by the terms of the policy contract and its assurance to defendant as aforesaid, by reason whereof defendant suffered damage to the full amount of any excess of the judgment over and above the amount of indemnity stipulated by the policy's terms." The defendant prayed judgment in accordance with its claims. The reply denied all of the allegations of new matter set out in the answer.

The action was tried to the court without a jury. Findings were made in favor of the plaintiff, to the effect that the allegations of the complaint were true, and, as mixed conclusions of law and fact,

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that all sums paid by the plaintiff, exceeding the sum of $1,500, were not made by it as a mere volunteer, such excess being paid to the use and benefit of the defendant. The court also found all of the claims recited in the answer to be unfounded. Judgment was ordered for the plaintiff in accordance with its demand. The defendant's application for a new trial was denied, and the defendant appealed.

1. The natural line of inquiry leads us to consider, first, the defendant's claim of the right to a reformation of the insurance contract, for, if its contentions in this regard are well founded, the plaintiff would have no standing. The defendant, while admitting that the policy involved in this action did not, on its face, indemnify it to exceed $1,500 for an injury suffered by one of its employees, insists that the oral contract between the parties, antedating the written one, contemplated an indemnity up to $5,000, and that the policy should be reformed accordingly. The court having found against this contention, the question for our determination is: Is such finding manifestly and palpably contrary to the evidence?

The sufficiency of the evidence to sustain the claim made must be considered in connection with the established rules concerning the reformation of contracts in general, and of insurance contracts in particular, which rules, as stated in Norman v. Kelso Farmers Mutual Fire Ins. Co. 114 Minn. 49, 130 N. W. 13, are to the effect that generally, to entitle one to a reformation, it must appear substantially that the alleged agreement existed, that the written contract failed to express the same, because of mutual mistake, or for other reasons not here material, and that the facts necessary to the reformation must be established by consistent evidence, unequivocally and convincingly leading to the hypothesis sought to be established, a mere preponderance of evidence being insufficient; and while the general rule has been qualified in cases relating to insurance contracts, these, nevertheless, should not easily be disturbed, or their terms materially changed, without cogent proofs of mistake.

In applying these rules to the case in hand, a detailed statement of the proofs would be unprofitable. Stated generally, therefore, the defendant's case under its evidence is as follows: In 1903 it in-

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sured all its employees in the plaintiff company, the indemnity fixed by the agreement being in the sum of $5,000 in each case, and to evidence this contract the plaintiff issued to the defendant a so-called "binder," which bound the insurance company for a period of 10 days in accordance with the alleged agreement, or until a policy was delivered. In 1904 and 1905 the insurance was renewed on the same basis, and in 1906, by agreement, there was another renewal for a term of three years. In 1903 and 1904 only one policy was issued, but in 1905 and 1906 the business was covered by two policies. The defendant offered no positive evidence that these policies were for the sum of $5,000 on their face; but its president, who had the business in charge, testified that they were so to the best of his recollection, and that he thought he examined the 1906 policy when he received it, and that it contained a $5,000 provision was his only recollection. In June, 1907, all of the original policies mentioned were destroyed by fire while in the defendant's possession. Thereafter, at the defendant's request, the plaintiff furnished the defendant with duplicates of the 1906 policies. On the trial, no written application for any of the insurance mentioned was produced. Upon the evidence of the matters stated, and the fact that it appeared that the plaintiff actually paid the Davidson judgment on the theory that it was bound in the sum of $5,000, the defendant predicates its claim of error in this regard.

The plaintiff, while conceding that a binder was issued, showing on its face an indemnity in the sum of $5,000, claimed that this was a mere temporary matter, and that the clear understanding was that separate policies were to be issued indemnifying the defendant in the sum of $1,500 as to each workman employed inside of the defendant's shop, and $5,000 as to each workman employed on the outside, and that separate policies were delivered to the defendant in accordance with and embodying this understanding. Employees and ex-employees of the plaintiff testified to the effect that, when the policies came to the plaintiff's Minneapolis office, it was their duty to enter, in a book known as the "liability policy register," from the original policies, the essentials thereof. Over the objection and

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exception of the defendant, the court permitted such witnesses to use this book to refresh their recollections, and to testify that in each of the years mentioned two policies were issued to the defendant, which in all respects conformed to the plaintiff's claim in such regard. The defendant contends that it was reversible error to permit these witnesses so to testify, and also that their testimony should not be considered. We cannot so hold.

The policies had been destroyed, and it was material to show the substance of their contents. The entries, having been made by the several witnesses who testified in this regard, constituted a sufficient memorandum. There can be no doubt that, had the original policies been in existence, they would all have been competent evidence to establish the course of the dealings of the parties. Having been destroyed, secondary evidence of their contents was proper; and the witnesses who had actually seen them, and had made entries of their relevant provisions, could properly use such entries as memoranda to refresh recollection. The testimony of one Eddy in this regard was founded upon a somewhat narrow foundation; but the error, if any, is insufficient to warrant our disregarding his testimony, much less a reversal. Nor have we overlooked the defendant's point that the plaintiff should have produced the defendant's original applications for insurance; but we are unable to find in the record any evidence establishing that there were any applications in the sense in which the defendant uses this term. Moreover, if the defendant, to aid in establishing its affirmative claim, desired to use the alleged applications, notice to produce should have been given. We hold that the court's determination concerning reformation cannot be disturbed.

2. It appeared that on November 7, 1907, the defendant's employee Davidson was injured, while working inside the defendant's shop, by the bursting of an emery wheel. The defendant notified the plaintiff of the accident, of the breaking of the employee's leg thereby, and that the cause was unknown, except as stated; the injured man having been about 45 feet from the wheel when it burst. After being in the hospital about eight weeks, Davidson

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proposed to the defendant to settle his claim for damages for $350, of which fact the defendant advised the plaintiff, who thereupon stated that the matter would be attended to. Some two or three days later, Davidson advised the defendant that no one had called to see him concerning his claim. Whereupon the defendant advised the plaintiff of such fact, and that they must attend to the case at once, to which the plaintiff replied that it would make arrangements to see Davidson immediately. Some two or three days later a similar occurrence took place, and a few days thereafter an agent of the plaintiff attempted to settle with Davidson, refusing, however, to agree on the basis theretofore suggested, and offering him only $150. Davidson then became angry and refused to settle for less than $2,000. The negotiations for a settlement were thereupon discontinued, and the Davidson suit followed.

It is upon this state of facts that the defendant predicates its claim that the plaintiff was negligent, and that it is in no event entitled to a recovery in this action. This contention, however, cannot be sustained. Its basis must necessarily be that the plaintiff failed to perform some duty owing by it to the defendant, to its damage. Aside from what has been stated, there was no showing of how the accident occurred, or that a prudent person could have ascertained, prior to the verdict, that any liability had been incurred by the defendant on account of such accident, or that any state of facts existed which created a liability in favor of the injured employee, or that a prudent person could have anticipated that the employee would in any event recover a verdict for any sum in the action which ensued. Manifestly, no finding of negligence could be sustained under the circumstances.

3. We come, now, to the plaintiff's right to recover, and we do not think this question requires extended treatment. That the plaintiff paid out over $2,500 to satisfy the Davidson judgment, which the defendant would have been required to pay, if the plaintiff had not, is conceded, if the plaintiff's contention as to the amount of the policy here involved is, as we have already held, to be sustained, and we are satisfied that this payment was made

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through a mistake of fact. The gist of the defendant's claim of nonliability for the amount so paid, not before disposed of, is that the payment was voluntarily made, without the knowledge of the defendant, or its request, either express or implied.

In Emmert v. Thompson, 49 Minn. 386, 391, 52 N. W. 31, 32 Am. St. 566, the principle governing this case was thus stated by Mr. Justice Collins:

"It has been well said that the doctrine of subrogation has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons. It is not founded upon contract, but is the creation of equity, is enforced solely for accomplishing the ends of substantial justice, and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay it, and is not dependent upon contract, privity, or strict suretyship."

See, also, the application of the same principle in First Nat. Bank of Goodhue v. Village of Goodhue, supra, page 362, 139 N. W. 599. The action in that case was to recover money received and used for a legitimate purpose by the defendant therein, a municipality, under a contract invalid in part, because certain legal requirements had not been complied with, but which was not beyond the power of the corporation to make. The court said: "The doctrines of assumpsit are applicable to municipalities as well as to natural persons, and the action may be maintained on any of the common counts, not from any contract entered into on the subject, but from the general obligation to do justice, which binds all persons natural or artificial."

See, also, in this connection, 3 Dunnell, Minn. Dig. §§ 9036, 9041. The plaintiff was not an intermeddler, and under the principles above announced we hold that it had the right to recover.

Order affirmed.

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STEPHEN JANOCHOSKY and Others v. EMIL KURR and Another.[1]

February 14, 1913.

Nos. 17,854—(188).

Finding sustained by evidence.

Findings to the effect that plaintiffs, who possessed the right to redeem from a foreclosure sale, refrained from so doing in reliance on an oral agreement of the one who had procured the sheriff's certificate that he would, after the time for redemption expired, transfer to them their respective interests, upon being paid their pro rata share, *held* sustained by the evidence.

Statute of frauds — part performance.

Held, following Williams v. Stewart, 25 Minn. 516, that where a person holding a valuable right refrains from exercising the same, in reliance upon an oral agreement of another to convey, until such right expires, it constitutes sufficient part performance to take the agreement out of the statute of frauds.

Specific performance — party.

The widow of the mortgagor, who was not a party to the oral agreement, and whose interest was extinguished when the time for redemption from the foreclosure sale expired, *held* not a necessary party to this action to enforce specific performance of the agreement.

Evidence.

The evidence does not show that the contract sought to be enforced was entered into for the corrupt purpose of unlawfully depriving a third party of property interests or rights.

Action in the district court for Benton county for a decree to determine that defendants, since the expiration of the period of redemption from the foreclosure sale of the mortgage mentioned in the opinion, held the premises described in trust for the benefit of plaintiffs, that defendants convey by proper deed to plaintiffs, and to recover $1,402.87 as damages. The facts and the substance of

[1] Reported in 139 N. W. 944.

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the pleadings will be found in the opinion. The case was tried before Taylor, J., who made findings to the effect that plaintiffs were entitled to the ownership in fee of the undivided 8/9 of the real estate upon paying to defendant Emil $1,886.86, and interest. From an order denying defendants' motion for a new trial, they appealed. Affirmed.

J. D. Sullivan, for appellant.

Bruener & Ahles, for respondents.

HOLT, J.

In 1900 George Janochosky, the father of plaintiffs and the defendant Rosa Kurr, died owning a farm of 160 acres in Benton county, this state, upon which was a mortgage of $2,200 held by Albert Wruck. Some of the plaintiffs were then minors, but an arrangement was made whereby one of them, Stephen, remained on and cultivated the farm and gave a home and care to the minors, paying $175 annually. This paid interest on the mortgage and taxes. In 1908 the mortgage was long past due, and the mortgagee, Wruck, began foreclosure proceedings by advertisement.

The defendant Emil Kurr, the husband of defendant Rosa Kurr, first observed the newspaper publication of the foreclosure notice, and called the attention of some of the plaintiffs thereto. Thereupon the children of George Janochosky and the wives and husbands of those that were married appear to have taken counsel and concluded that it would be advisable to let the foreclosure ripen into a title in the successful bidder at the sale, so as to cut out the interest of their stepmother, the widow of George Janochosky, although it is claimed that she renounced her interest in the real estate and was satisfied with her statutory allowance out of the personal property of her deceased husband. To that end, on the day preceding the foreclosure sale, the defendant Emil Kurr and one or two of plaintiffs procured Mr. Wruck, the mortgagee, to go to his attorney's office and execute a writing by which he, in case the premises were bid in by him at the sale, agreed to assign the sheriff's certificate of sale to Emil Kurr upon receipt of the purchase price, interest,

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and expense in cash within one year from the date of sale. Wruck became the purchaser at the sale. Six weeks thereafter Emil Kurr paid Wruck the amount for which the sale was made, together with the interest since the sale, and procured an assignment of the sheriff's certificate.

The contention of plaintiffs is that Kurr, in what he did, acted for all the children of Janochosky; that he represented to them that he had procured the assignment for them, that nothing should be done till after the year of redemption had expired, and that, when this happened without any redemption by their stepmother, each child should receive its just share. Soon after the expiration of the time for redemption, plaintiffs requested Emil Kurr to comply with his agreement; but he refused, maintaining that the understanding was that, if any of the children desired to participate in the transaction, they should pay a proportionate part of the amount paid for the assignment before the year of redemption expired.

The court made findings of fact favorable to the theory of plaintiffs, and directed judgment that they own eight-ninths of the land, upon paying eight-ninths of the amount for which Emil Kurr obtained the sheriff's certificate, together with interest, and made provision for carrying the judgment into effect. From the order denying defendants' motion for a new trial, they appeal, and assign as errors the court's findings of fact to the effect, in substance, that defendant Emil Kurr agreed to convey to plaintiffs after the expiration of the time for redemption, the conclusion of law that plaintiffs are entitled to specific performance, the refusal of the court to find that the widow of George Janochosky was a necessary party, and that the plaintiffs are not entitled to the aid of the court in decreeing specific performance of a contract which had for its object the perpetration of a fraud upon the rights of a third party.

The findings assailed are quite lengthy, and in addition to what has already been stated concerning the purpose of plaintiffs and defendants to obtain the title to the property through the foreclosure, freed from any claim of the widow of George Janochosky thereto, are to the effect that the plaintiffs Peter and Stephen Janochosky

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and defendant Emil Kurr saw the mortgagee, Albert Wruck, and procured his oral promise that, if he bid in the property, he would transfer the same to the children before payment of his claim, and that he would accept such payment and make the transfer, either before or within a reasonable time after the time to redeem had expired; that these three persons afterwards procured the writing mentioned from Wruck, prepared by his attorney, Wruck then informing them that he was willing to accept the money after the year expired, although the right to pay the money and obtain a transfer was in said writing coextensive with the time of redemption. By the efforts of said plaintiffs and the defendants who attended the sale, bidders who came there to bid in the property were induced to refrain from so doing, so as to permit Wruck to bid it in for the amount of his debt and then hold it subject to the agreement made to ultimately vest the title in the children. It is also found that it was the understanding and agreement between all of said parties that the title to the property should be acquired under and by virtue of the foreclosure sale for the equal benefit of all the children of George Janochosky, each of whom should contribute a pro rata share for the purchase thereof, and in all the transactions Emil Kurr acted for his wife Rosa, and plaintiffs so understood.

The court also found that soon after Emil Kurr had obtained the assignment of the sheriff's certificate from Wruck, and plaintiffs learned thereof, he assured them that it was so procured to carry out the understanding had, but also told them that none should share in the property unless he paid his proportionate share, and that plaintiffs all the time understood and believed that they could make such payment after the period of redemption expired, and thereby secure their respective interests in the property in accordance with their agreement.

We think the findings are so well sustained by the evidence that this court cannot interfere. In fact, there is much in the situation of the parties and their conduct as shown by the record in support of plaintiffs' contentions. Within six weeks after Emil Kurr obtained the agreement to assign the sheriff's certificate, he obtained

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an assignment thereof from Wruck. He informed none of the plaintiffs of this, nor asked that they contribute any part of the money necessary therefor. Some of the plaintiffs testify that when they learned of this they inquired of Emil Kurr what it meant, and he said he took the assignment as a precautionary measure against Wruck's death, and that it was done in carrying out the understanding and agreement had between the parties, and further told them to rest till after the time for redemption expired. Shortly after this expired some of the plaintiffs saw Emil Kurr, stating that they were now ready to contribute their share, and requested Kurr to comply with the agreement. He then denied that they had any interest in the land and claimed absolute ownership of the whole thereof.

It is undoubtedly true that all of Janochosky's children planned to so arrange matters that the foreclosure should result in finally vesting in them the whole title to the land, and for that purpose the bargain with Wruck was made; the defendant Emil Kurr acting for his wife. In fact, defendant's counsel takes the position, if we understand him correctly, that the purpose in procuring the agreement to assign the certificate from Wruck was to vest the title in the children; but he insists that Emil Kurr obtained the agreement and subsequently the assignment for the benefit of those only who, within the year of redemption, should pay their proportionate share of the money paid to Wruck. So that the substantial dispute or conflict on the facts is whether the understanding was that the right of the children to participate in the title to be derived from the foreclosure depended on their paying their share of the money before or after the year of redemption expired.

It is true the writing obtained from Wruck indicates that the assignment must be procured before the redemption expired. But it was well established that Wruck was very willing to have the land go to the children, and stated that even after the expiration of the year of redemption he would accept the money. Furthermore, after Emil Kurr's concession that the agreement with Wruck was for the benefit of those who might desire to participate in the benefits of the foreclosure, it seems strange that he should so soon take

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the assignment, and take it without being urged so to do by Wruck, and without notice to plaintiffs, or any request that they furnish their share of the requisite money. These matters rather confirm the story of two of the plaintiffs that when they, after learning that Emil Kurr had obtained an assignment of the sheriff's certificate, inquired what it meant, he stated that it was but carrying out the agreement, and they should let matters rest till the redemption had expired, and, if the widow did not redeem, then the children should each receive the proper share in the land.

We see no ground for disapproving the findings made by the learned trial court, and it necessarily follows that the proposed findings contrary to those made were rightly refused.

Had we no precedent, the doubtful question in this case would be whether the facts found justified the court in holding that there was such part performance of an oral contract to convey that specific performance should be decreed. We have here these facts: Plaintiffs had an interest in the lands in question, namely, the right of redemption, and they let this right expire in reliance on the defendant's oral promise to convey to them, if the stepmother did not redeem, their several shares upon making certain payments. We think the principle announced in Williams v. Stewart, 25 Minn. 516, is applicable and controls here. The court, speaking through Chief Justice Gilfillan, at page 519, says: "Mrs. Williams, being one of the mortgagors, and having in the property an interest which the law recognizes and will protect, had a right to redeem from the foreclosure sale. This was a valuable right, and if, as the court below has found, she refrained from exercising this right because of and relying upon the agreement to convey, until the right expired, we think it was a sufficient part performance to take the agreement out of the operation of the statute of frauds. Ryan v. Dox, 34 N. Y. 307." The oral agreement in that case was, however, deficient as to the time when some of the payments were to be made; but such defect does not exist in the present case, because the law will imply that all should be paid within a reasonable time after the year of redemption expired. The principle applied in

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Williams v. Stewart, supra, is further elucidated in the cases of Brown v. Hoag, 35 Minn. 373, 29 N. W. 135, Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146, Jorgenson v. Jorgenson, 81 Minn. 428, 84 N. W. 221, Veum v. Sheeran, 95 Minn. 315, 104 N. W. 135, and Paine v. Wilcox, 16 Wis. 202.

Although it is not found that there was an intentional fraud on the part of Emil Kurr, a legal or constructive fraud is worked on plaintiffs, if they, in reliance upon the promise that they would receive their shares in the land after the redemption expired, refrained from redeeming while the right existed. As said in Brown v. Hoag, page 377, supra: "The underlying principle is that, where one of the contracting parties has been induced or allowed to alter his situation on the faith of an oral agreement within the statute [of frauds], to such an extent that it would be a fraud on part of the other party to set up its invalidity, equity will make the case an exception to the statute."

We do not think the case at bar referable to or governed by chapter 60, R. L. 1905, relating to uses and trusts; and cases cited, such as Wentworth v. Wentworth, 2 Minn. 238 (277) 72 Am. Dec. 97, Connelly v. Sheridan, 41 Minn. 18, 42 N. W. 595, Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295, Haaven v. Hoaas, 60 Minn. 313, 62 N. W. 110, and Luse v. Reed, 63 Minn. 5, 65 N. W. 91, are not in point.

It is clear that the stepmother of plaintiffs, the widow of George Janochosky, is not a necessary party; for on the theory of plaintiffs, as well as of defendants, the agreement was not made for her benefit, and she certainly had no interest in the subject-matter of the action, the land, after the year of redemption expired.

As to the claim that fraud tainted the oral agreement, because its purpose was to cut out the interest of the stepmother of plaintiffs and defendant Rosa in this land, it may be said that it ill becomes the defendants to urge the proposition, if it had any merit. But we are inclined to believe that the record furnishes no basis for the contention. For the widow to redeem or participate in a redemption may have been of questionable expediency from the viewpoint of her best interest. Her life estate in the homestead, and

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one-third in the balance, made it perhaps uncertain whether to her the rights to be acquired by a redemption were worth the price. Furthermore, the evidence discloses that she desired the children to have the land, that she took what the law gave to her in the personal property of her deceased husband, that she had been married to George Janochosky for only a couple of years, and within two weeks after his death left the homestead and moved to her own farm, and never since that time—that is, since 1900—has she asserted any claim to the land or its products. We do not think the arrangement found by the court to have been made between plaintiffs and defendant Emil Kurr savors of fraud upon the stepmother of plaintiffs.

The order appealed from is affirmed.

ARTHUR E. DREW v. JOHN D. CARROLL.[1]

February 14, 1913.

Nos. 17,896—(179).

Evidence admissible.

Refusal of trial court, in action for commission on sale of land, to strike out plaintiff's testimony as to the contents of a letter alleged to have been written by him to defendant, *held*, under the circumstances, not error.

Cross-examination on collateral matter.

Assignment of error to action of trial court, in allowing defendant to be cross-examined as to how much he received by way of commission or profit on a sale of land which he himself had previously made, overruled.

Parol evidence admissible.

Action of trial court in admitting parol proof of the contents of a minor document collaterally involved in the action sustained.

Action in the district court for Anoka county to recover $2,840 commission for making a sale of land belonging to defendant. The

[1] Reported in 139 N. W. 953.

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answer denied the allegations of the complaint. The case was tried before Giddings, J., and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

J. W. Buffington and *Will A. Blanchard,* for appellant.

H. E. Fryberger and *Albert F. Pratt,* for respondent.

PHILIP E. BROWN, J.

At the time of the alleged occurrences involved in this action the parties thereto resided in North Dakota, on farms some three miles apart, and had known each other for some time. The court submitted to the jury the issues, made both by the pleadings and the evidence, whether, while the defendant and his wife were visiting the plaintiff, the parties entered into an oral contract to the effect that if the plaintiff would find a purchaser for the defendant's farm, or one who would make a deal with him therefor, he would pay the plaintiff a commission of one dollar an acre, and, if so, did the plaintiff perform the conditions of such contract? After the return of a verdict for the plaintiff, the defendant appealed from an order denying him a new trial. The only errors asserted relate to the admission of evidence or to the court's refusal to strike out testimony.

1. Subsequently to the introduction by the plaintiff of evidence tending to show the making of the contract and its due performance on his part, he testified, without objection, that thereafter on two occasions the defendant promised to pay him his commission, and that the plaintiff also wrote the defendant twice, and subsequently to the introduction of this testimony the following proceedings were had, relating to the letters referred to:

"Q. What did you say in those letters?

[Defendant's Counsel:] "Objected to as incompetent.

[Plaintiff's Counsel:] "Will you produce the letters, please?

[Defendant's Counsel:] "There has been no notice to produce, and I don't know that there is any such letter in existence, and I

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object to it on the ground that it is incompetent, and not the best evidence. No proper notice to produce has been served.

"Q. What did you write in that letter? A. I wrote and asked him if he was ready to pay my commission. It was a very short letter, probably not more than four or five lines.

[Defendant's Counsel:] "I move to strike out the answer, and object to the question on the ground that it is incompetent and no proper foundation laid.

"The Court: Overruled."

We hold that, aside from the question of this testimony being without prejudice under the circumstances disclosed, the ruling was not erroneous. The question answered was not objected to, and it was within the discretion of the trial court to grant or deny the motion, subsequently made, to strike out the answer. Dunnell, Minn. Practice, § 1820; 3 Dunnell, Minn. Digest, § 9746.

2. The plaintiff advanced the theory, on the issue stated concerning his performance of the contract, that pursuant thereto he furnished the defendant with the names of certain probable prospective purchasers, to one of whom the defendant sold his farm. The defendant denied the making of the contract, and, while urging the improbability of the plaintiff's claims, admitted that the plaintiff gave him the names of the men referred to, claiming, however, that this was done "as one neighbor would give them to another." On the defendant's cross-examination he was interrogated as follows:

"Q. It is true, is it not, that one dollar an acre is a reasonable commission, and even two dollars an acre is reasonable commission? A. No, sir; one dollar an acre is as much as they charge for selling a farm. Q. Isn't it a fact that you sold a farm for one of your neighbors the year before, some time in 1909?

[Defendant's Counsel:] "Objected to as immaterial and not proper cross-examination.

[Plaintiff's Counsel:] "It is offered for the purpose of showing the amount of the commission.

"The Court: Overruled.

"A. Yes, sir. Q. How big a commission did you get?

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[Defendant's Counsel:] "Objected to as immaterial.
"The Court: Overruled.
[Defendant's Counsel:] "Exception.
"A. I didn't sell it on commission."

Further questions were asked of and answered by the defendant without objection, eliciting that the owner of a certain farm advised the defendant that he decided to sell it within a week, and that if the defendant would so dispose of it he could have it for a certain price, but that the land must be sold within a week. Thereafter the defendant advised the owner that he would take the farm at the price fixed, then knowing of a prospective purchaser, to whom he wrote advising him of the opportunity, and that, if he desired to buy the farm referred to, he must take it immediately, and within a few days thereafter the defendant sold the farm to his correspondent at a profit of $2,500.

The defendant argues that it was error to overrule the objections made. We hold otherwise.

The alleged objectionable testimony was material, as tending to show the unlikelihood of the defendant's insistence. In the event of the correctness of this conclusion being considered questionable, then the defendant is met with the rule that the trial court is vested with a large discretion in determining the allowable latitude of cross-examination relating to collateral matters, and that its action in such regard will not be disturbed except for clear abuse of discretion. Murphy v. Backer, 67 Minn. 510, 70 N. W. 799; 3 Dunnell, Minn. Dig. § 10,318. It is also apparent, we think, that the answers to the questions objected to were harmless; and while it is true, as a general proposition, that when an objection is made to a question and overruled, it is unnecessary for counsel further to continue to interpose objections to questions of the same character asked the same witness, in order to save his point (Carson v. Hawley, 82 Minn. 204, 84 N. W. 746; 3 Dunnell, Minn. Dig. § 9738), yet it must appear that a bona fide attempt was made to keep out the testimony challenged. Here the testimony received over the defendant's objection related to *commissions* for the sale

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of land, while the testimony which he now complains of, and to the introduction of which he interposed no objection, concerned *profits* accruing from the purchase and sale of the same land.

3. The defendant's last claim is that the court erred in allowing the contents of a letter to be proved by parol testimony. The matter came up in the following manner: The plaintiff, in order to show efforts on his part to effect a sale of the defendant's lands, testified that, after the making of the contract with the plaintiff, he took a Mr. Best to the defendant's farm for the purpose of selling it to him, and that he so advised Mr. Best. Mr. Best, while admitting that he had some conversation with the plaintiff concerning an exchange for his lands, and also that the plaintiff drove him to the defendant's farm, where the defendant advised Best that he wanted to sell his land at a certain price, gave evidence, tending to dispute the plaintiff's testimony, to the effect that the plaintiff advised him of his desire that he should purchase the defendant's farm, and, furthermore, that at the time referred to he was not in the vicinity of the defendant's lands with the purpose of purchasing, but that his business was to exchange farms with the plaintiff. No claim was made by the plaintiff that any disposition of the defendant's farm was ever made to Mr. Best. In rebuttal, the court permitted the plaintiff's wife to testify, as against the defendant's objection, to the contents of a letter claimed to have been received by her from Mr. Best prior to the occurrences last mentioned as follows: "In that letter Mr. Best stated that he wished to get a large tract of land in North Dakota for the purpose of exchanging for something. I couldn't read the next word, I couldn't make it out. There was a word or two that I could not make out. But after a while I found it was lumber yard. So the letter stated that he wished to get hold of a large tract of land in North Dakota, for the purpose of exchanging for a lumber yard."

The defendant insists that no proper foundation was laid for the introduction of this testimony. The determination of this question, however, rested largely within the discretion of the trial court (1 Dunnell, Minn. Dig. § 3267), and we find no abuse. The following excerpt from the opinion in Wehring v. Modern Wood-

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men, 107 Minn. 25, 28, 119 N. W. 245, 246, is apt on the contention stated, and also on the further question of the necessity of laying any foundation, by proof of loss of the letter or otherwise, before proving its contents orally; this letter being a minor document only collaterally involved:

"The degree of proof required to lay the foundation for secondary or parol evidence of the contents of a written instrument depends upon the circumstances of each particular case, such as the character of the instrument, its relation to the issue, and whether the original is within or without the jurisdiction of the court. Where the instrument is the foundation of the action or defense, stricter proof should be required than in a case where the existence and contents of a writing are only incidentally or collaterally involved. See 17 Cyc. 508. Now, in the case under consideration, the original writing was the notice sent out of the state to the Modern Woodmen for publication. The published notice was not the foundation of the plaintiff's action, but only a collateral fact relevant to the question of diligence in making inquiry for the whereabouts of the insured. It would seem that in such a case it would not be necessary to lay any foundation. 21 Am. & Eng. Enc. (2d ed.) 1097."

On the latter question, see also Charles v. Atlantic, 78 S. C. 36, 58 S. E. 927, 125 Am. St. 762, 17 Cyc. 469, and 2 Wigmore, Evidence, § 1291, where the reasons for dispensing with production of attesting witnesses to minor documents collaterally involved are stated in terms peculiarly applicable to the question before us.

In any event this question was one peculiarly within the discretion of the trial court, whose determination is certainly not reviewable, in the absence of abuse, which does not here appear. Says Mr. Wigmore, in commenting upon the exception of documents "collateral to the action" from the rule of profert, and after adverting to the elusiveness of the word "collateral": "There seems no alternative but to accept the current and traditional term 'collateral' as serving to define the exception. But in any case the misfortune of inconsistent precedents and the disadvantage of an obscure

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definition can be obviated by applying strictly that salutary doctrine of judicial discretion. Let the trial judge determine absolutely, and without review, the application of the principle to each case. Whether a document is 'collateral' is practically a question whether it is important enough under all the circumstances to need production; and the judge presiding over the trial is fittest to determine this question finally." 2 Wigmore, Evidence, § 1253.

Order affirmed.

WILLIAM C. FOSTER v. CITY OF DULUTH.[1]

February 14, 1913.

Nos. 17,904—(241).

Public property not taxable.

The property of the state and of its political subdivisions, arms, and agencies, such as cities within its borders, when used for exclusively public purposes, is not subject to taxation, or to proceedings for the assessment of taxes, or for their collection by judgment and sale.

Enforcement of prior tax against public property invalid.

Where real property, acquired by the state or a city for exclusively public purposes, is, when so acquired, subject to a lien for unpaid taxes, all proceedings taken to enforce such lien, after the property is so acquired for public purposes, are void.

Action of ejectment in the district court for St. Louis county. The case was tried before Dibell, J., who made findings and ordered judgment in favor of defendant. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

William G. White, for appellant.

H. A. Carmichael, for respondent.

[1] Reported in 140 N. W. 129.

Note.—On the question of the liability of public property to local assessments, see notes in 35 L.R.A. 38 and 18 L.R.A.(N.S.) 453.

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BUNN, J.

This is an action in ejectment to recover the possession of eight lots in Duluth. The complaint alleged that plaintiff was the owner in fee, and that defendant was wrongfully in possession. The answer denied that plaintiff was the owner, admitted defendant's possession, and alleged that defendant was the owner in fee of the property. The trial resulted in a decision in favor of defendant, and plaintiff appealed from an order denying a new trial.

The ultimate question involved is whether plaintiff or defendant is the owner of the property. The facts are as follows: Prior to July 17, 1905, Emily Galusha owned the lots. On that day she conveyed to the city of Duluth, and soon thereafter the city constructed thereon an "incinerator plant or crematory," for the disposal of garbage, and the lots have since been used by the city for this purpose. Plaintiff's claim of title is based upon tax certificates issued upon a sale held pursuant to a tax judgment rendered in 1907 for the taxes for the year 1905. Notices of expiration of the time for redemption were given in February, 1911, directed to the city of Duluth, in whose name the lots appeared from the assessment book for 1910 to be assessed. There was no redemption.

Plaintiff claims that the lien for the 1905 tax attached May 1, 1905; that it is a perpetual lien from that date; that the city, when it purchased the property in July, 1905, took it subject to this lien; and that, though the land was not subject to taxation after July 17, 1905, the judgment was valid, and also the sale and subsequent proceedings. Defendant claims that the lien for the 1905 tax did not attach until after the conveyance to the city, and that in any event, the property not being subject to taxation, after the city acquired it for public purposes, the court had no jurisdiction to render the tax judgment.

After its purchase by the city in July, 1905, the property was devoted to public uses, and became public property. It was not thereafter subject to taxation. This is conceded by plaintiff. It is technically inaccurate to say that it was *exempt* from taxation, for the term "exemption" rather presupposes a liability removed by some constitutional or statutory provision. The property is "ex-

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empt," not because of any such provision declaring it exempt, but because of its character as public property devoted to a public use. The property of the state and of its political subdivisions, arms, or agencies, such as cities within its borders, when used exclusively for public purposes, is not subject to taxation, in the absence of constitutional or statutory provisions making public property subject to the tax laws of the state. This is the undisputed rule; but it is no better established than is the proposition that proceedings for the assessment of taxes against public property, or for their collection by judgment and sale, are absolutely void. This is not only because the property was exempt from taxation, but because it was public property. A reason for the rule is that a sale of the property to enforce collection of taxes assessed against it would destroy its character as public property, to the public injury.

The distinction is clear between property exempted from taxation by constitutional or statutory provisions, when such property would be subject to taxation in the absence of such provisions, as, for example, church property, institutions of public charity, or the property of corporations which pay a gross earnings tax, and public property used exclusively for public purposes, which would not be subject to taxation, though the Constitution had not so provided. In the one case the property exempted is private property, which for good reasons it is deemed wise or just to relieve from the burden of taxes that it would otherwise be obliged to sustain; in the other case the property is owned by the state, or by its agencies, is devoted to a public use, and is not subject to taxation for reasons that are different in character, among which may be suggested the fact that the taxation of public property owned by the state or its municipal divisions would mean that the state would be taxing itself in order to raise money to pay over to itself, and the reason, before suggested, that the collection of such taxes might result in destroying the public character of the property.

The distinction is again clearly apparent when we consider the doctrine of Chauncey v. Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826, which was that, in proceedings to enforce the payment of taxes against real estate, the court had jurisdiction to try the case and

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render judgment against the land, notwithstanding that the taxes had been in fact paid, or that the land was in fact exempt from taxation. But this doctrine never had any application to proceedings to enforce the payment of taxes on public property. This is very clearly decided in Sanborn v. City of Minneapolis, 35 Minn. 314, 29 N. W. 126. It is interesting and important to note that this decision was rendered during the time when the court was torn up over Chauncey v. Wass, after the original decision, and before the decision on reargument. Mr. Justice Mitchell said: "Without entering at all upon the question of the conclusiveness of a tax judgment as against private persons, which is now before us in another case" (undoubtedly Chauncey v. Wass) "it is clear that it can have no force or effect whatever as against the rights of the public in these premises." The property against which the tax judgment had been entered was a public alley in Minneapolis. The decision was that the court acquired no jurisdiction, and that the judgment was void. The language of the opinion is clear and pertinent here:

"At common law the title to all public highways was in the king, for the benefit of all his subjects. In this country such title is in the state, either directly or through municipalities, or such agencies as it may create for that purpose, for the use and benefit of all its citizens. The rights or interests of the state in land are not subject to the provisions of the laws for the assessment and collection of taxes. The courts cannot, in these tax proceedings, acquire any jurisdiction over these public rights or interests. The state cannot be subjected to the jurisdiction of the courts, nor be compelled to defend in them. This was suggested in County of Chisago v. St. Paul & Duluth R. Co. 27 Minn. 109, 6 N. W. 454."

The suggestion in the case referred to was this statement by Chief Justice Gilfillan: "This jurisdiction" (in tax proceedings) "extends over the interest in the land of every person, company, or corporation—of every owner, indeed—unless where, from the character of the owner (as, for instance, the United States), the state

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cannot subject such owner to the jurisdiction of its courts in respect to lands within the state." It is beyond doubt, therefore, that the doctrine of Chauncey v. Wass never had any application to tax proceedings against public property, even before the statute was enacted that made void every tax judgment rendered when the land was exempt. The Sanborn case is conclusive on this, and it is clear that the conclusion that proceedings for the assessment of taxes on public property, or for their collection by judgment and sale, are void, rests, not upon the fact that the property was exempt, but upon the fact that it was public property—that the proceedings were against the state. It is the character of the property and of its owner that makes the proceedings void.

Does the fact, conceding it to be a fact, that the lien for the 1905 taxes attached to the property before it became public property, give validity to the proceedings taken after the city acquired the title? That this would be so in the case of property which, after the lien attaches, becomes exempt because of its transfer to a church, charitable corporation, or to a corporation which pays a gross earnings tax, may be conceded. State v. Northwestern Telephone Exchange Co., 80 Minn. 17, 82 N. W. 1090; County of Martin v. Drake, 40 Minn. 137, 41 N. W. 942. See 37 Cyc. p. 897, and cases cited in note. But the cases cited are not authority on the question here, because of the vital fact that this is public property, devoted to a public use, and that the proceedings to enforce payment of the taxes are against the state, or one of its municipal subdivisions. We think, logically and reasoning from these premises, that it must be held that all proceedings taken after the property became public property were void, notwithstanding that the taxes for the current year may have been a lien on the property before its transfer. It by no means follows, as counsel for plaintiff insists it does, that, because there was a valid lien, the proceedings to enforce that lien were valid. Nor is it important here what becomes of the lien. We need not consider whether it still exists as an unenforceable lien, whether plaintiff is entitled to refundment, or whether the lien is merged in the fee title. All that is necessary to decide, and all that we do decide, is that all proceedings to assess the land for taxes,

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taken after it became public property, and all proceedings in attempting to enforce and collect the tax were void.

This decision is the only one that will prevent the disastrous result of property devoted to a public use being, through the carelessness of public officials, lost to the public on tax judgments and sales, and is, we think, in entire accord with the settled policy of the state that public property shall not be subject to taxation, or to the laws in regard to proceedings to enforce the collection of taxes. It is, moreover, in harmony with our own past decisions, and supported by well-considered decisions of other courts.

In Reid v. State, 74 Ind. 252, real estate became by escheat public property of the state after a lien for taxes had attached. It was held that any assessment for taxes upon the land, or its sale for delinquent taxes, after it became state property, would be void as against the state. In State v. Academy, 13 Mo. App. 213, the same doctrine was applied to property used for charitable purposes and made exempt by a statute passed after a tax had been assessed. It was held that the act exempting the property had the effect of repealing the enactments under whose provisions the assessment was made, and that the proceedings to collect the tax were void. By citing this case we are not to be understood as approving the reasoning upon which the decision is based, or the application of the doctrine to property other than purely public property used for public purposes.

In Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991, 21 L.R.A. (N. S.) 68, the city acquired by condemnation proceedings lands for public use at a time when taxes had been levied and were delinquent and unpaid. It was decided that the city took the lands free from the lien of the taxes. The court distinguishes, if it does not practically overrule, the case of City of Puyallup v. Lakin, 45 Wash. 368, 88 Pac. 578, much relied on by plaintiff in the case at bar. It appears to us that the case was not correctly decided, and that this was appreciated by the court in the Gasaway case, which is apparently in sharp conflict with the former decision. The decision in the latter case does not rest upon any statute of Washington which frees public property from a lien for taxes which attached

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before the property became public, but upon the broad principle that "no person or municipality can acquire, as against the state, a vested right to taxes, or the right to insist upon the collection of taxes when levied."

Counsel for plaintiff argues that, because there is no statute providing that the state or a city, purchasing land for a public use, may hold the land exempt from the enforcement of an existing lien for taxes, it must of necessity be held that such lien may be enforced. But, for the reasons previously stated, we think the conclusion does not follow. The rule applicable to private property, or to property used for railroad, charitable, or quasi public purposes, has no force against the state, no application to property used exclusively for purely public purposes.

The question is well stated by counsel for plaintiff in his brief: "Did the fact that this property became 'public property' on July 17, 1905, divest the courts of jurisdiction to enforce against it the collection of an existing tax lien?" Counsel concedes that, if the court had no jurisdiction to render any judgment in this tax proceedings, the judgment was a nullity, and plaintiff's title must fail. But he insists that the court did have jurisdiction to render the judgment, and bases his argument largely upon Chauncey v. Wass. This argument is answered by what we have already said in regard to the doctrine of that case not having any application to tax proceedings against public property. We do not see that State v. Camp, 79 Minn. 343, 82 N. W. 645, is at all in point. We decide the question framed by counsel in the affirmative. This disposes of the case, and makes unnecessary the consideration of other questions argued.

Order affirmed.

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ADELHEID M. ZINN and Others v. ANTON HUHN and Another.[1]

February 14, 1913.

Nos. 17,906—(174).

Vacating judgment by default.

An order denying an application to open a default judgment and for leave to defend in the action *held* not an abuse of discretion.

On April 12, 1912, judgment in favor of plaintiff for $563.47 was entered in the district court for Hennepin county. The facts are stated in the opinion. Defendant Huhn's motion to vacate the judgment was denied, Waite, J. Thereafter the same defendant obtained an order to show cause why the judgment should not be set aside and defendants permitted to answer. The matter was heard and the motion denied. From the order denying the motion, defendant Huhn appealed. Affirmed.

Bracelen & Cronin, for appellants.

Fred W. Reed and *Fifield, Fletcher & Fifield*, for respondents.

BROWN, C. J.

This action was brought to recover upon a promissory note bearing date March 18, 1885, and due 60 days from date. The complaint alleges the making and delivery of the note by defendants, and that no part thereof has ever been paid, except as therein stated, namely, $50 on March 23, 1889, $10 on March 19, 1895, $5 on March 4, 1901, and $1 on March 9, 1907. Judgment for the balance due, with interest, was demanded. The summons was served upon defendant Huhn personally on March 22, 1912. He failed to appear in the action, and default judgment was rendered against him on April 12, of which entry he had personal notice on April 22, 1912.

[1] Reported in 139 N. W. 952.

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On May 20 following he gave notice of motion to vacate the judgment on the ground that it was prematurely entered, and for leave to answer, which was noticed to be heard on June 1. The motion came on for hearing and was denied by the court on June 3. The motion was founded on the claim, made by affidavit, that the summons was not served upon defendant until April 11, and that the judgment was entered before the expiration of 20 days thereafter. In denying the motion the court found against defendant's claim in this respect. Thereafter, on June 8, defendant applied for and obtained an order to show cause why he should not be relieved from the default and permitted to answer and defend in the action. The order to show cause was supported by a proposed answer and affidavits excusing the failure to answer within 20 days from the date of the service. The application was denied and defendant appealed.

The application was addressed to the discretion of the court below, and we are unable to discover, from the record, any sufficient reason for declaring the denial of the relief asked an abuse of discretion. The defense sought to be interposed was the statute of limitations; the making and delivery of the note sued on being admitted. The several payments alleged in the complaint were all denied by the answer, as well as by affidavit; but the affidavits presented by plaintiffs fully justified the court in finding that all such payments were made as alleged in the complaint. The note was made by defendants as copartners. They were then associated in business and resided in the state of Wisconsin. The copartnership was soon thereafter dissolved, and defendant Huhn removed to Minnesota in 1886, or 1887. The first payment was made by defendant Huhn, and the other two by his comaker and former partner; the last having been made on March 9, 1907.

Defendant knew of the entry of judgment on April 22, yet he made no move to be permitted to defend until the latter part of May. His excuse is found in the fact that he in good faith believed that the judgment was prematurely entered. In this he was mistaken. There was no showing of sickness, business pressure, forgetfulness, or other excuse for not appearing in time, and whether the delay was unreasonable, and whether the proposed defense was substantial on its

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merits, were questions for the trial court. We are unable to say that there was an abuse of discretion in resolving the questions against the defendant.

Order affirmed.

THOMAS L. WANN v. NORTHWESTERN TRUST COMPANY and Others.[1]

February 14, 1913.

Nos. 17,909—(240).

Reversing findings of trial court.

1. The findings of a trial court are of equal weight with the verdict of a jury, they will not be set aside, unless manifestly and palpably against the weight of the evidence, or if upon any reasonable theory of the evidence they can be sustained, or if under the evidence different persons might arrive at different conclusions.

Action for fraud.

2. In order to sustain an action for fraud, it must appear that defendant has made a false representation of a material fact, susceptible of knowledge, knowing it to be false, or as of knowledge where he does not know whether it is true or false, with intent to induce plaintiff to rely upon it, and that plaintiff has relied on it, and is deceived, to his damage.

Same — statutory action to set aside decree.

3. In an action, brought under R. L. 1905, § 4277, to vacate a decree for fraud, the representation must be of a substantial character, and must be unequivocal. The statute was not intended to excuse a party from exercising proper diligence in preparing for trial. He must show that he himself was guilty of no negligence.

Action against trustee — evidence necessary.

4. Where a beneficiary seeks to charge a trustee with fraud, less evidence is ordinarily required to establish it than where parties are dealing at arm's length. But in this case the beneficiary was a business man familiar with the subject of the trust, the relations between beneficiary and trustee had for a long time been strained, the beneficiary had for some time been making

[1] Reported in 139 N. W. 1061.

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independent investigation, had expressed entire want of confidence in the trustee, had freely criticised expenditures and failure to make collections by the trustee, had employed an attorney in the very matter of the account determined by the decree, and had finally consented to its allowance on its being corrected as suggested by him. *Held*, the case presents the ordinary one of adversary parties, and the ordinary rules of evidence apply.

Allowance of trustee's account — subsequent transactions.

5. A decree allowing an interlocutory account of a trustee does not pass upon items of expenditure which are made after its entry, and upon a claim presented after its entry, when such matters were not in fact referred to in the account, and not in fact litigated, even though the facts out of which the claim arose occurred before entry of the decree. Representations as to such matters are not material in an action to set aside the decree.

Same — clerical error.

6. A palpable clerical error in a statement cannot be made the basis of an action for fraud. So *held*, where the statement reports a collection on an account to a date four months after the date of the statement. Nor can fraud be predicated on an erroneous statement that collections have been made on a contract, where from the record the court cannot determine whether any claim in fact exists, nor where, if a claim did exist, it is still a distinct and subsisting obligation of a solvent party.

Incorrect general allegations in petition for allowance of account.

7. A general allegation in a petition for allowance of an account of a trustee that it has collected all accounts due the estate, which proves to be incorrect as to small items, is not, as a matter of law, such fraud as will justify the vacation of the degree. The same is true of an affirmative statement of the trustee in answer to a general question. The circumstances are to be considered, and it is *held* that the finding of the trial court that there was no actionable fraud because of such statements in this case should not be set aside on appeal.

Finding sustained by evidence.

8. There was evidence that one officer of the trustee represented to appellant that certain collections under a heating contract were not made because no heat was furnished. It appeared on the trial that heat was furnished. Another officer of the trustee testified that it was collected for in full. The court so found. *Held*, the finding is sustained by the evidence, and there was no actionable misrepresentation.

Refusal to admit evidence.

9. The rejection of an offer of evidence, intended to prove fraudulent concealment of the purpose for which an expenditure was made by means of an evasive statement of account, will not on appeal be held reversible error,

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where pertinent facts that were before the trial court are not in the record on appeal, especially where the item was reported to the beneficiary more than three years before the entry of the decree, where other items of account arising out of the same contract were the subject of examination, criticism, and negotiation between the parties before the entry of the decree, and where the facts were discovered before the commencement of this action and are not alleged in the complaint.

Representations as to subsequent transaction.

10. Representations as to the terms of a renewal lease are not ground for vacation of the decree, where the renewal lease was not consummated until after entry of the decree.

Effect of allowance of account.

11. The correctness of items of collection reported in the account filed is settled by the decree allowing it. Appellant offered to prove various small discrepancies in the account. No reason appeared why they could not have been presented on the hearing on the account. *Held* no error.

Action in the district court for Ramsey county against the Northwestern Trust Company and Florence von Schwerin to vacate a judgment entered June 27, 1910, which allowed the accounts of defendant trust company as trustee under the will of John Wann, deceased, to investigate the conduct and management of the trustee, and to surcharge its accounts for the period prior to June 27, 1910, as well as subsequent thereto, with the amount of loss and damage incurred. Defendant trust company, in its separate answer, alleged that its account of receipts and expenditures had been allowed and approved by that court after all the parties interested in the trust, as beneficiaries or otherwise, including plaintiff, had been cited, and that all the parties appeared and submitted themselves to the jurisdiction of the court. Defendant Schwerin in her separate answer prayed that plaintiff take nothing by the action. The case was tried before Dickson, J., who made findings and ordered judgment in favor of defendants. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

M. D. Munn and *P. L. McLaughlin*, for appellant.

John D. O'Brien and *A. E. Horn*, for respondents.

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HALLAM, J.

This action is brought by appellant, as one of two beneficiaries under a trust, to set aside, on the ground of fraud, a decree allowing an interlocutory account of the trustee. The other beneficiary, appellant's sister, Florence von Schwerin, refused to join as plaintiff, and she was accordingly made a defendant. She answered, and opposed the demands of plaintiff. The trial court found that no fraud had been committed, and denied the relief asked. The plaintiff appeals.

John Wann was the owner of valuable improved property in the city of St. Paul. There were buildings rented to tenants, and a heating, electric light, and power plant installed for the purpose of supplying heat, light, and power to tenants and others. During his lifetime he placed the care of this property with respondent trust company. Prior to his death he left a will, in which, among other things, he devised to the trust company an undivided two-thirds of said property, with full power of sale and reinvestment, and with directions to hold and manage the same, and to pay the net proceeds thereof, one half to appellant, the other half to his said sister. This will was duly probated, and a final decree assigning said property as aforesaid was entered in the probate court, December 3, 1906.

On February 4, 1910, the trust company presented to the district court of Ramsey county its petition, reciting that it had performed the duties imposed upon it as such trustee, and had rendered to said beneficiaries statements of all receipts and disbursements pertaining to said trust, and had paid over and accounted for all the said net income to said beneficiaries; that a statement of all said receipts and disbursements, being a copy of all the statements rendered to said beneficiaries, was therewith filed in court; and that a statement of the receipts and disbursements pertaining to said trust from date thereof down to the time of the hearing of said petition would be filed at or before the time of said hearing. Petitioner offered its resignation as trustee and asked for a hearing, for examination, allowance, and approval of the accounts, that its resignation as trustee be accepted, and that it be released and discharged from all responsibility

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and liability on account of said trusts. A subsequent account was filed, covering the period to June 11, 1910.

On June 27, 1910, the resignation of said trustee having been withdrawn, a decree was entered, upon this petition, "that the accounts herein filed * * * be and the same are, in all things, hereby allowed and approved as stated and filed herein," and that the said trustee continue to perform its duties as such. This decree is conclusive, in the absence of fraud. Kittson v. St. Paul Trust Co. 78 Minn. 325, 81 N. W. 7. Appellant contends that the decree was procured by fraud on the part of the trustee. The alleged fraud consists mainly of the following:

Misrepresentation as to the existence and amount of a claim by the St. Paul Gaslight Company under a contract made by deceased October 14, 1904.

Misrepresentation in regard to collections made from Finch, Young & McConville on account of heat furnished under an old contract, which was renewed December 31, 1906, to continue to May 1, 1907.

Misrepresentation in regard to collections made from French, Finch & Henry for heat furnished upon a contract for the year 1907.

Misrepresentation as to reason for failure to collect rent for six months of a small house at 875 Front street.

Misrepresentation as to the amount of heat furnished to Guiterman Bros. and as to reasons for not making certain collections.

Misrepresentation as to a claim in favor of George T. Simpson in connection with a contract with Foot, Schulze & Co.

Misrepresentations, in statements rendered, as to having made collections of all sums due the estate, which are alleged to have been untrue as to various claims, and concealment of the fact that certain money was paid out for damages due to negligence.

1. The trial court has found against appellant on the issue of fraud. His findings are of equal weight with the verdict of a jury (Tew v. Webster, 103 Minn. 110, 113, 114 N. W. 647; Knoblauch v. Kronschnabel, 18 Minn. 272 [300]) and should not be set aside, un-

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less manifestly and palpably against the weight of the evidence (Banning v. Edes, 6 Minn. 270 [402]; Dixon v. Merritt, 6 Minn. 98 [160]; Remley v. Travelers' Insurance Co. 108 Minn. 31, 121 N. W. 230), or if upon any reasonable theory of the evidence they can be sustained (Benz v. Geissell, 24 Minn. 169), or if the evidence was of such a character that different persons might from it arrive at different conclusions (Linn v. Rugg, 19 Minn. 145 [181] Eich v. Taylor, 17 Minn. 145 [172]).

2. In order to sustain an action for fraud, it must appear that the defendant has made a false representation of a material fact susceptible of knowledge, knowing it to be false, or has made such representation as of his own knowledge, where he does not know whether it is true or false, with intent to induce the plaintiff to rely upon it, and that plaintiff has relied upon it, is deceived, and is pecuniarily damaged. Riggs v. Thorpe, 67 Minn. 217, 219, 69 N. W. 891. All of these elements must be proven.

3. This action is to set aside a judgment under R. L. 1905, § 4277. The relief asked is of an extraordinary character. Schweinfurter v. Schmahl, 69 Minn. 418, 72 N. W. 702. A decree of a court, once entered, is not to be lightly set aside. It is desirable that matters closed by a decree should be set at rest, and misrepresentations, to warrant the court in vacating a decree, should be of a tangible and substantial character. Fraud cannot be established by inconsequential circumstances, nor by equivocal evidence that is equally consistent with honest intention. Sprague, Warner & Co. v. Kempe, 74 Minn. 465, 77 N. W. 412. Nor was this statute intended to excuse a party from exercising proper diligence in preparing for trial and in advising himself as to facts the evidence of which is at hand. The party bringing such action must show that he was entirely free from contributory negligence. Hass v. Billings, 42 Minn. 63, 43 N. W. 797; Schweinfurter v. Schmahl, supra.

4. It is undoubtedly true that in the ordinary case of trustee and beneficiary, where there is the usual relation of dependence and confidence, the parties do not stand upon equal footing, and less evidence is required to establish fraud than in the case of parties dealing at arm's length. But in this case, in view of the situation of

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the parties and their relations for some time prior to the entry of this decree, the litigation is the ordinary one of adversary parties, and the ordinary rules of evidence apply.

Appellant was at this time 48 years old and in the full vigor of active business life. He had been a resident of St. Paul for many years, had been in frequent conference or communication with the trustee during the whole period of this trust, and particularly during the latter portion thereof, had frequently discussed with its officers the management of the trust, had on occasions made investigations of his own as to matters connected with it, and had on numerous occasions criticised freely the administration of the trust. The relations between these parties had for a long time been strained. On May 2, 1911, appellant wrote a letter to the president of the Trust Company. Referring to the vice president and managing officer and the treasurer, the officers with whom he had had his dealings, he said:

"I told you over a year ago that both these men were so disingenuous and unfair, persistently attempting to mislead me, verbally and in writing, that it was a waste of time for me to try to talk to them or get any satisfaction from them."

And he further said of the answer of the president on that occasion:

"You told me that the trust company would proceed along legal lines, making reports to the court at stated intervals, and that I could object to the reports if I saw fit, and that I could in no other way receive any consideration from the officers of the Trust Company."

After the petition was filed, appellant employed competent counsel to protect his interest. The correspondence between them indicates that "several weeks" before March 28, his attorney proposed to the trust company to submit the accounts to two members of the board of directors and one outside person, instead of going into court and try-

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ing matters out there. An understanding between them was finally arrived at, by which the trust company was to withdraw its resignation and continue to act as trustee, and the accounts to be presented to the court for approval were to be corrected in accordance with a letter written by appellant to the trust company May 27, a letter not in evidence, and when so corrected to be approved. A decree was entered pursuant to this understanding.

Approaching this case in the light of these well-established rules of law, and viewing it in the light of these significant facts, let us consider the particular charges of fraud.

REPRESENTATIONS AS TO CLAIMS OF ST. PAUL GASLIGHT COMPANY AND SIMPSON.

5. Appellant relies largely upon certain alleged misrepresentations as to a claim of the St. Paul Gaslight Company, which appellant alleges grew out of negligence of respondent. The trial court found that no such misrepresentations were made. It is unnecessary to consider the correctness of this finding.

It clearly appears that, if any such representations were made, they were wholly immaterial to this case. The decree in question was made June 27, 1910. This claim was not presented by the gas company to the trustee until September, 1910, and was not paid until January 14, 1911. It is true the facts, out of which this claim arose, occurred prior to the entry of the decree. But no reference was made to this claim in the account settled by the decree. It was not litigated, and could not well have been litigated. The decree does not refer to it, either in terms or by inference. It was the view of the trial court that the propriety of this payment was in no manner passed upon by the decree, and in this we concur. It further appears that the trial court made the same ruling when this claim was asserted on a hearing for the allowance of a subsequent account of the trustee, and counsel for the respondent trust company in terms assented to this ruling. Being an immaterial matter, no representations regarding it can in any manner affect this case. The claim that, if appellant had discovered the trustee negligent in this particular, he would have scrutinized the account more closely in others, is not entitled

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to great weight, in view of all the circumstances disclosed by the evidence.

For similar reasons, any misrepresentations as to the Simpson claim were immaterial to the issues of this case.

REPRESENTATIONS AS TO FINCH, YOUNG & MC CONVILLE CLAIM.

6. The next item relates to a heating contract with Finch, Young & McConville. During 1906 a contract existed under which the trustee furnished heat to Finch, Young & McConville at "a flat amount to be paid * * * during each year." There was a provision that, if during any year the price of coal should exceed $4 a ton, an amount proportioned to such increase price should be added to this flat amount for that year. This contract expired December 31, 1906. It was extended until April 30, 1907, but upon what terms does not appear.

The trustee made no collection under the differential clause of the old contract above referred to for the renewal period. On October 8, 1907, the trustee rendered a statement showing that it collected on September 1 for difference in average price of coal, "1—1—06 to 12—31—07, $737.50." In fact, it had collected only to "12—31—06." This is the representation relied upon.

In our judgment, appellant cannot predicate fraud upon this statement. The statement, taken literally, reports that the trustee on September 1 made collection based on the price of coal for four months yet to come and during a period when no contract at all existed. Of course, nothing of the sort was intended, and it is not claimed that appellant understood the statement as a representation to that effect. What appellant does contend is that this statement is to be construed as a representation that collection was made for difference in average price of coal up to April 30, 1907, the date of expiration of the extended term. This is not the language of the statement, and it cannot be so construed. The fact is the date "12—31—07" is a palpable mistake. It is reasonable to believe that it was written by clerical error for "12—31—06," the date to which collection was in fact made. The statement would commonly be so un-

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derstood. At any rate, it was not such a representation as appellant claims for it.

Nor does it appear that there was any damage done if the statement was false. The trustee claims that it had no right to make any collection on this account after "12—31—06." We cannot say that this claim is incorrect. As above stated, the terms of the renewal contract do not appear. Some agreement must have been made as to the price to be paid for the four months of 1907, either by apportionment of the annual "flat amount" or otherwise. It does not appear what such agreement was. A portion only of this old contract appears in the record. This portion of the contract suggests no method of arriving at the amount to be paid for an extension for four winter months. It is impossible to determine from this record what the rights of the parties for this period in fact were.

It further appears that Finch, Young & McConville has at all times been a going and solvent concern. If this concern owed anything to the trustee on this renewal contract, it still owes it, and it has not been discharged by any statement made by the trustee. An interlocutory decree approving a trustee's account of collections and disbursements does not discharge creditors from payment of accounts due to the trust estate. Nor does it determine that the trustee is absolved from collecting a distinct and independent claim, such as this is alleged to be. If it had appeared on the hearing of the trustee's account that a distinct item of this sort had been overlooked, the trustee's account would not have been surcharged with the amount, unless it had disabled itself from collecting it by release or otherwise, or had refused to do so. Nothing of that sort appears here.

REPRESENTATIONS AS TO FRENCH, FINCH & HENRY CLAIM.

7. The next item relates to a claim of $200 due from French, Finch & Henry. It appears that, under a contract similar to that with Finch, Young & McConville, $200 was due the trustee from French, Finch & Henry for the year 1907. Appellant's interest in this was $66.66. This firm went into liquidation in 1908. No reason appears why this amount was not collected in full, except that the secretary of the trust company testified that he was told by other

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officers of the company that this item was included with other claims in a compromise of demands due from French, Finch & Henry. This information appears to have been incorrect. But the only representation claimed as to the matter is an allegation in the petition that the trustee had collected all accounts due the estate, which it is claimed was not true. There was also an offer to prove that appellant inquired of the trust company if there were any outstanding accounts uncollected for either rent, heat, light, or power, and was informed by them that there was not, excepting some small items not here material.

A general allegation in a petition for an allowance of an account that the trustee has collected all accounts due the estate is not, as a matter of law, such a representation as will entitle a beneficiary to vacate the decree allowing the account. If this were the law, then every such decree could be vacated where a trustee in general terms asserts the verity of his accounts, and where inaccuracy afterwards appears. Such a rule would render such decrees of little value.

Likewise a statement in answer to a general question that all accounts have been collected does not justify the vacation of the decree, simply because it later develops that there is outstanding a small claim more than three years old against a defunct concern, which the officers of the trustee believed was included in a compromise.

Furthermore, the French, Finch & Henry lease and contract had during this same period been the subject of much controversy between the appellant and the trustee. Appellant had complained that the trustee had failed to collect all that was due under the lease, and certain claims under the lease were placed with appellant's own attorney for collection. There were disputes over repairs made for these parties, and it is claimed by appellant that the proposal of arbitration above referred to was prompted by some difference as to expenditures in connection with this very contract. Under all the circumstances, it seems clear that appellant might by the exercise of reasonable diligence have fully informed himself as to these facts before the entry of the decree. The finding of the court that there was here no actionable fraud must be sustained.

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REPRESENTATIONS AS TO RENT FOR 875 FRONT STREET.

The next charge relates to a failure to collect rent amounting to $72 for premises known as "875 Front Street." Appellant's interest in this was $24. No sufficient reason appears why this rent was not collected, and it does appear that at one time the treasurer of the trust company advised appellant that the reason this rent was not collected was that the premises were vacant during the period in question. It is now admitted that this statement was not true; but the trustee contends that it was made in good faith and on information from the cashier in the office, and the court so found. There was also testimony that appellant learned all the facts as to this matter before the entry of the decree. The court found this to be the fact. There is evidence sufficient to sustain the findings of the court.

REPRESENTATIONS AS TO ACCOUNTS OF GUITERMAN BROS.

8. The next charge relates to representations in connection with a contract to furnish heat to Guiterman Bros. It is claimed that the trustee furnished heat for a room in the third floor of No. 350 Sibley street, and the second, third, and fourth floors of 346–348 Sibley street, for which no collection was made. As to No. 350, no representations were made. The contract provided for heating the second floor, but such heat was not required. There was evidence that for this reason no charge was made for the third-floor room. The court so found. As to 346–348, there is evidence on the part of appellant that the heat was furnished and not paid for, and that the treasurer of the trust company represented to appellant that no heat was furnished. This representation, if made, was not true. The secretary of the company, however, testified that the steam furnished for these floors was paid for, that the bills therefor were included in the meter readings, and the same were collected in full. If this was the fact, there was no misrepresentation. The court so found, and there is evidence to sustain the finding.

9. Appellant offered to show that in December, 1906, or January, 1907, respondent negligently permitted certain steam pipes to freeze, causing a damage to one of the tenants, Guiterman Bros.

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which resulted in the Northwestern Trust Company paying over $1,000 in settlement for such damage; that this disbursement was reported in the monthly statement made to appellant and filed in court under the head of repairs and improvements to the Guiterman Building; and that plaintiff did not know such payment covered damages until the fall of 1911. This offer was rejected. This is assigned as error.

The gist of the offer is that respondent fraudulently reported an expenditure for damages due to neglect under the head of "repairs" and "improvements." We are not disposed to countenance the report of expenditures by a trustee under evasive or deceptive titles, but upon the whole record we cannot say that the evidence offered would sustain a finding of fraudulent representations.

The language of this report of the trustee which constitutes the alleged representation, though part of the record in the trial court, is not in the return to this court, and it is not contained in the paper book or any of the briefs. We cannot hold the rejection of an offer of evidence to be error when pertinent facts that were before the trial court are not in the record on appeal. It is self-evident that this freeze-up did not entail "repair." Whether the amount thereof was included in the item, together with the "damage" to the tenant, does not appear.

This large payment had been made, and this conspicuous item had been reported to appellant, more than three years before the decree was made. During this period almost every phase of the Guiterman leases and contracts had been the subject of repeated conference, correspondence, and criticism. In one letter inquiry is made as to a small bill of $49 for plate glass. We cite this instance simply to show the attention appellant was giving to even the small items of this account.

Matters pertaining to Guiterman Bros. leases and contracts form a large part of the allegations of the complaint. The offer of proof indicates that appellant learned the facts as to this payment in the fall of 1911. The complaint in this action was verified January 30, 1912, yet this large item is not mentioned in the complaint, while

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an item of $80 and another of $72 are made the subject of extended allegations.

Under all the circumstances of the case, we cannot hold the exclusion of this evidence reversible error.

10. There is a charge of misrepresentation as to the term of a renewal lease with Guiterman Bros.; but this lease was not consummated until after the decree, and the conduct of the trustee in connection with it is not affected by the decree.

11. There are numerous charges that incorrect amounts were collected from various parties for light, heat, and power. The trial court found that there was no fraud in connection with any of the items as to which evidence was received. In no case is it claimed that the amount in fact collected was incorrectly reported. The charge is that the statement in the petition and the general representation that all accounts had been collected, taken in connection with these alleged delinquencies, constituted actionable fraud. For reasons heretofore stated, we hold that such representations do not constitute actionable fraud, and the finding of the trial court is sustained.

There were also offers to prove other various discrepancies of a similar character. The court was right in refusing to permit an inquiry into the details of these transactions for the purpose of showing that the items collected were of incorrect amounts. Of course, the decree is conclusive as to the correctness of these items, unless vacated; but no specific misrepresentations were charged in connection with them, and no reason appeared why the objections to them could not have been presented on the hearing of the trustee's account.

There are charges of misrepresentations as to the general result of the management of the steam plant by the trustee. These alleged statements are so general, and so largely matters of opinion and belief, deduced from accounts that were furnished to appellant, that they cannot form a basis for relief on the ground of fraud.

Order affirmed.

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W. S. HOLLISTON v. FRED ERNSTON and Another.[1]

February 14, 1913.

Nos. 17,948—(192).

Injunction — appeal from findings.

In an action for a permanent injunction, tried to the court, where findings of fact and conclusions of law are made that plaintiff is entitled to judgment restraining and enjoining defendants, the order for judgment is not appealable.

Action in the district court for Yellow Medicine county to restrain defendants from individually operating an omnibus or baggage line in the city of Granite Falls. Defendants answered separately. The case was tried before Qvale, J., who made findings and as conclusion of law found that plaintiff was entitled to judgment and ordered entry of judgment enjoining defendants from driving a bus in the city of Granite Falls so long as plaintiff should continue in his present employment. From the order wherein defendants were restrained from driving a bus in the city of Granite Falls so long as plaintiff continued in his employment of bus driving, defendants appealed. Appeal dismissed.

Davis & Michel, Paul D. Stratton and *John I. Davis,* for appellants.

Bert O. Loe and *Daly & Barnard,* for respondent.

PER CURIAM.

The respondent has not raised the point that the order is not appealable, but at the argument counsel's attention was directed to the proposition by the court. Subdivision 2 of section 4365, R. L. 1905, provides that an aggrieved party may appeal from an order "which grants, refuses, dissolves, or refuses to dissolve, an injunction." But it is clear that this refers to an order which in and of

[1] Reported in 139 N. W. 805.

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itself grants or refuses the injunction. Where the injunction asked for is granted by an order upon motion and hearing had, such order neither contemplates nor directs a judgment to be entered to carry it into effect and is appealable. The service of such order enjoins the party, and disobedience of the order may be punished as contempt.

But such is not this case. It cannot be claimed that service of the findings of fact and conclusions of law embodying the order for judgment would enjoin defendants, or subject them to punishment as for contempt in case of disobedience. The order appealed from does not enjoin defendants. It directs a judgment restraining and enjoining them to be entered. Until that is done there is no injunction against them from which to appeal. This was held in Johnson v. Northern Pacific F. F. & B. H. Ry. Co. 39 Minn. 30, 38 N. W. 804, which was an action for a mandatory injunction, where both parties appealed from the findings and order for judgment. The court says: "Upon looking into the record, however, we find that each appeal is from the finding and conclusions of the court, which are referred to as orders in the notices of appeal. The only way in which these findings, or direction for judgment thereon, can be reviewed, is by appeal from the judgment or order denying or granting a new trial. No question of practice is better settled."

An appeal does not lie from the findings and order for judgment. Von Glahn v. Sommer, 11 Minn. 132 (203); Prahl v. County of Brown, 104 Minn. 227, 116 N. W. 483; Doran v. Kennedy, 117 Minn. 535, 136 N. W. 1134. When the order appealed from is not appealable, this court is without jurisdiction, and the appeal should be dismissed. County of Renville v. City of Minneapolis, 112 Minn. 487, 128 N. W. 669.

Appeal dismissed.

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PETER HOVEN v. CHARLES L. HAAS COMMISSION COMPANY.[1]

February 21, 1913.

Nos. 17,655—(35).

Sale on commission — decision sustained by evidence.

Plaintiff consigned horses to defendant for sale on commission. Defendant sold the horses, and plaintiff brought this action, claiming that he instructed defendant not to sell at less than a stated price, which was larger than that received on the sale made, and seeking to recover damages. It is *held* that the decision of the trial court to the effect that no instructions as to price were given, and that the sale was made at the best price obtainable on the market, is sustained by the evidence.

Action in the district court for Ramsey county to recover $785. The facts are stated in the opinion. At the trial before Dickson, J., it was agreed in open court that the issues in the case are as here stated, notwithstanding anything in the pleadings to the contrary: Plaintiff claimed he instructed defendant to sell the horses for $160 a head, and not less, and the sale made by defendant was in violation of these instructions. Plaintiff claimed the right to recover the difference between $160 a head, less all expenses, and the price received. Defendant claimed it had no instructions to sell for not less than $160 a head, that it had the right to sell at the fair market value, and did sell at that value. The court made findings of fact and ordered judgment in favor of defendant. The substance of the

[1] Reported in 140 N. W. 110.

Note.—As to the right to commission where broker procures purchaser at price stated by his principal, but on slightly different terms in regard to cash or time of payment, and the owner refuses to consummate the sale, see note in 21 L.R.A. (N.S.) 935.

The question of the effect upon the right to commission, of fact that owner sells to broker's customer at reduced price, is the subject of annotation in 15 L.R.A.(N.S.) 272 and in 34 L.R.A.(N.S.) 1050.

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findings is given in the opinion. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Halbert & Halbert, for appellant.

Durment, Moore & Sanborn, for respondent.

BUNN, J.

Plaintiff, a dealer in live stock at Hoven, South Dakota, consigned 19 horses to defendant at South St. Paul for sale on commission. Defendant sold the horses for a total of $2,755, an average of $145 each. Plaintiff brought this action, claiming that he instructed defendant not to sell the horses for less than $160 each, and seeking to recover the difference between that price and the amount of the sale, and other damages. Defendant claimed that it had no instructions not to sell for less than $160 per head, and that it had a right to, and did, sell the horses at the fair market value thereof.

The trial court decided the issue of fact thus presented in favor of defendant, holding that plaintiff authorized defendant to sell the horses on the market for the best price obtainable, that he did not instruct defendant not to sell for less than $160 per head, that the price obtained was the highest market price for horses of that kind and grade on the day of the sale, and that it had not been shown that there was any higher market price for such horses at any time subsequent to the sale. Defendant having fully accounted to plaintiff for the money received from the sale, less its proper commission and expenses, the court found that plaintiff was not entitled to recover, and ordered judgment for defendant. Plaintiff moved for a new trial, and from an order denying such motion appealed to this court.

Two questions are argued in the briefs: (1) Does the evidence sustain the decision that plaintiff did not give instructions not to sell at less than $160 per head? (2) If such instructions were given, what is the measure of damages for a sale in violation thereof? Of course, if the first question is decided adversely to plaintiff's contention, the second question does not arise.

Plaintiff testified positively that on August 9, at South St. Paul, he told Mr. Haas, president of the defendant, that the least he would take for the horses was $160 per head, and that if he could

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not get that he would ship them to Chicago. Haas testified with equal positiveness that plaintiff gave him no selling price. Plaintiff left South St. Paul on the evening of the 9th for Hoven, South Dakota. On his arrival there about 11 o'clock the following morning, he was handed a telegram from defendant reading:

"Can sell twelve horses hundred and sixty, round nineteen for twenty-six sixty. Answer."

Plaintiff immediately wired:

"Cannot accept your offer on the twelve horses, will be there Monday."

At about 2 o'clock on the same day plaintiff delivered to the agent at Hoven a second telegram to defendant, which read:

"Cannot sell horses less than one hundred sixty each for twenty head. Will be there Monday."

This message was sent at 3:45 p. m. on the same day, but was not received by defendant until after the sale of the 19 horses for $2,755, which sale was made on the afternoon of the 10th and reported to plaintiff by telegram received at Hoven at 3:48 p. m. Defendant denied receiving the telegram sent at 11 a. m., and was corroborated by the testimony of the operator at South St. Paul, who was unable to find any record in his office showing the receipt of the telegram.

Clearly the evidence was insufficient to conclusively show the receipt by defendant of any telegram forbidding a sale at less than $160 per head before the sale was actually made, and warranted a decision that no such telegram was received prior to the sale. As the direct evidence was sharply in conflict, it was for the trial court to determine where the truth was. We hold that its decision that no instructions were given as to the price for which the horses were to be sold, and that they were sold for the best price obtainable, is sufficiently sustained by the evidence. Clearly the weight of the

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evidence is not so manifestly and palpably against the decision as to justify our holding that it was an abuse of discretion to deny a new trial.

It is unnecessary to decide what would be the proper rule as to the measure of damages in case of a sale contrary to instructions.

Order affirmed.

ADA M. COX v. WILLIAM RUFUS EDWARDS.[1]

February 21, 1913.

Nos. 17,837—(165).

Questions for jury.

In this, an action for breach of promise to marry, the making of the promise, and, if made, whether the release pleaded as a defense was obtained by fraud or duress, *held* proper issues for jury.

Inference of prejudice from defect in charge to jury.

Where there is an omission or defect in the charge upon a material issue, namely, in not stating that, where it is sought to avoid a release pleaded as a defense to a contract on the ground that it was procured by fraud and duress, the burden is upon the plaintiff to prove the fraud or duress by clear and satisfactory evidence, the inference is strong that prejudice results from the refusal to give a request correctly stating the law upon a matter bearing on such issue.

Refusal to charge reversible error.

The refusal to give such request, which was to the effect that, "in order to find duress in this case, you must find that there was such pressure or constraint as compelled the plaintiff to go against her will, and such as took away her free agency and destroyed her power of refusing to sign the release," *held* reversible error, in view of the evidence in the case.

Promise indicating a present intention — fraud.

Although fraud cannot generally be predicated on a promise to do an act in the future, still, where the promise implies a present state of mind or existing intention of the promisor, and such is not the fact, but the promisor, in order to obtain a release, falsely induces the promisee to believe in and

[1] Reported in 139 N. W. 1070.

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rely on the existence of such state of mind or present intention, such conduct may constitute legal "fraud."

Charge to jury.

In a breach of promise suit, where the promise is denied, and no matter is pleaded in avoidance or defense by reason of the previous impure life of plaintiff, the court correctly instructed the jury that, if such impure life did in fact exist, it was no defense, and could be considered by the jury only as bearing on the credibility of her testimony and in mitigation of damages.

Action in the district court for Ramsey county to recover $25,000 for breach of promise to marry. The answer alleged a former action between the same parties, for the same cause of action, and the execution and delivery of a release of all claims thereunder upon the payment of $250. The reply admitted plaintiff signed her name to a writing, but denied knowledge of its contents, and set up that the signature was obtained by fraud, duress and overreaching of plaintiff, and not with her will, knowledge and consent. The case was tried before Kelly, J., and a jury which returned a verdict in favor of plaintiff for $15,208. Defendant's motion for judgment notwithstanding the verdict was denied, and a motion for a new trial was granted unless plaintiff consented to a reduction of the verdict to $12,500. Plaintiff consented to the reduction. From the order denying the motion for judgment notwithstanding the verdict and granting the motion for a new trial, unless plaintiff agreed to the reduction of the verdict, defendant appealed. Order affirmed so far as it denied judgment notwithstanding the verdict. Order reversed so far as it denied a new trial.

Owen Morris, for appellant.

Drill & Drill and *Stan J. Donnelly,* for respondent.

HOLT, J.

The action is for damages for breach of promise to marry, wherein the defense is a denial of the promise, and also a settlement and release of the cause of action. The trial resulted in a large verdict for plaintiff, and defendant appeals from the order denying his alternative motion for judgment non obstante veredicto or a new trial.

We apprehend that the reputation of neither party to this action

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will be enhanced by a discussion of the testimony herein. Nor are we disposed to sully the pages of our Reports with the same, except in so far as it may be necessary to allude thereto in considering the errors alleged.

In denying defendant's motion for a directed verdict, the court stated that the question whether or not plaintiff's cause of action was not barred by the release was a close one. With this opinion we fully agree. We are also of the opinion that the question is extremely close whether the evidence supports the finding that defendant ever promised to marry plaintiff. The improbability of such a promise being made under the circumstances detailed by plaintiff, want of any allusion to marriage in the voluminous correspondence of the parties after the time of the alleged engagement, and their subsequent conduct, wholly at variance with what would be expected if an engagement of marriage existed between them, strongly corroborates the contention of defendant that no promise was ever made. With some hesitancy we have, however, come to the conclusion that the trial court was justified in refusing to direct a verdict for defendant.

But, where a verdict has so doubtful or meager support in the evidence, the inference of prejudice from errors in rulings or inadequate instructions becomes persuasive and strong. The learned and experienced trial judge manifested his fairness and impartiality to the litigants, and a desire that the jury should also be imbued with the idea that as between plaintiff and defendant the pot should not call the kettle black. But on one phase of the controversy the legal rights of defendant were not fully protected by the charge.

Previous to the institution of the present action, plaintiff, through another attorney, had begun an action against defendant for the same cause. Subsequently the parties met, and, as defendant claims, settled the cause of action. In the instant case the defendant pleaded this settlement as a bar, setting out the written contract of settlement and release, signed and acknowledged by plaintiff. In her reply plaintiff admitted the execution of the instrument, but sought to avoid it by alleging that it was obtained by fraud and duress. Un-

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der the issue thus raised the burden rested on plaintiff to show that the release was so procured. The law is to the effect that the written instrument "becomes a 'strong wall of evidence,' not to be lightly overcome by unsatisfactory oral testimony." McCall v. Bushnell, 41 Minn. 37, 42 N. W. 545. Justice Mitchell, in Cummings v. Baars, 36 Minn. 350, 354, 31 N. W. 449, says: "There is a strong presumption that the written instrument, which the parties have deliberately executed, expresses their intentions; and if the written contract is to go for nothing, and the one party may oppose his oath to that of the other as to fraud, written contracts would amount to very little."

In Christianson v. Chicago, St. P., M. & O. Ry. Co. 67 Minn. 94, 98, 69 N. W. 640, the court observes that "where a party has, for a valuable consideration, executed a solemn instrument of release, there ought to be pretty strong and clear evidence impeaching it to warrant a court or jury in avoiding it." In Winter v. Great Northern Ry. Co. 118 Minn. 487, 136 N. W. 1089, the trial court charged the jury, with reference to a release pleaded as a defense to which plaintiff replied that it was obtained by fraud, that "the burden was on the plaintiff, to establish the alleged fraud by evidence clear and convincing to a reasonable certainty," and Chief Justice Start, in writing the opinion, characterized the instructions of the court as "clear and fair, neither party excepting to any of them." Section 8374, 3 Dunnell, Minn. Digest, states that the evidence of fraud must be clear. In cases like the one now before the court, where a formal release executed by plaintiff is set up as a defense, and plaintiff seeks to avoid its legal effect on the ground that it was procured through the fraud or deception of defendant, the burden is undoubtedly on plaintiff to prove the fraud, for the presumption is also in aid of the validity of the writing on that score. Of course, what is here said as to fraud is equally applicable to duress.

In the charge the court wholly omitted to state upon which litigant rested the burden of proof upon this issue, and no reference was made to the quality or character of evidence required to sustain the charge of fraud or duress. In fact, the inference from the charge is rather

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that defendant had the burden of proof on this proposition; for, in speaking of the release, the court says:

"I present this question at the outset, because, if you find from the evidence that the plaintiff signed and delivered the release freely and voluntarily, and was not fraudulently deceived by the defendant, or coerced by threats by him to sign and deliver this release, she is bound by its terms, and this action must end immediately by a verdict for the defendant. She admits signing the paper, but denies reading it, and claims that the defendant induced her to sign it by fraud and duress. If you find from the evidence that the plaintiff, in signing and delivering this release, on the payment of $250 made to her, was not induced or compelled to do so by any fraudulent misrepresentation, or by any duress or threats exercised over her by defendant, but that it was executed and delivered freely and voluntarily by the plaintiff, then the release is absolutely binding on plaintiff, and discharges the defendant." And again:

"And I charge you that, if you find from the evidence that the plaintiff freely, and uninfluenced by falsehood or fear of defendant, agreed to this release," it disposes of the case.

The above defect in the charge, in and of itself, is not available to defendant upon this appeal; for it is not specifically assigned as error, and was not called to the attention of the trial court by request to charge or otherwise. But it is important when we consider the prejudicial effect of a refusal to give the requested instruction now to be discussed.

As to the claim of duress, plaintiff testified that defendant threatened to use his power with the police force and with men of influence to drive plaintiff out of St. Paul and prevent her obtaining employment unless she signed the release, and the court instructed the jury with reference thereto as follows:

"As another ground for avoiding the release the plaintiff has pleaded that the defendant threatened her, at the time she signed it,

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with arrest by the police, with loss of business opportunities, through the influence which he claimed to have and to exert in this community. Now, if you believe from the evidence that any such threats were made by the defendant to the plaintiff, and that they were made to intimidate her, and that they did intimidate her to the extent that she was induced thereby to sign this release through fear, then the plaintiff is not bound by the release, although the defendant's threats were mere talk or bombast"—but refused to give this instruction, requested by defendant:

"In order to find duress in this case, you must find that there was such pressure or constraint as compelled the plaintiff to go against her will, and such as took away her free agency and destroyed her power of refusing to sign the release."

The court also refused to charge, as requested by defendant, that there was no evidence of duress. Assuming that there was, we think defendant entitled to the definition of duress contained in the instruction requested. From all definitions of duress, it is apparent that the gravamen is a coercion of the will by physical or mental restraint, so that the victim of the duress does not act as a free moral agent in respect to the matter at stake. And this thought should be clearly conveyed to the jury. Considering the state of the evidence, and the defect or omission in the charge hereinbefore referred to, we conclude it was error to refuse the instruction requested, which instruction we believe to be in harmony with the decision in Tapley v. Tapley, 10 Minn. 360 (448), 88 Am. Dec. 76, and in Joannin v. Ogilvie, 49 Minn. 564, 52 N. W. 217, 16 L.R.A. 376, 32 Am. St. 581, where this language is used:

"And the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation or apprehension of physical force."

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See, also, State v. Daniels, 118 Minn. 155, 136 N. W. 584, and 1 Dunnell, Minn. Digest, § 2848.

We consider unsound defendant's contention that a false promise to do something in the future can under no circumstances constitute fraud. We have no doubt that if defendant, in order to procure the release from plaintiff, made the promise to marry her, with no intention then had to fulfil the same, but simply to deceive her into executing such release, and she, in reliance on the promise, was induced to give it, the defendant's promise, though relating to something to be fulfilled in the future, may constitute fraud which avoids the release. Generally speaking, fraud cannot be predicated on promises. But a promise to marry is based on the present state of mind of the promisor. It implies the existence of a present intention. If, now, there exists no such intention, but the promisor nevertheless, for the sole purpose of inducing the promisee to act, falsely represents that the intention is there, and the promisee, in reliance thereupon, acts, we believe legal fraud is shown. There is a misrepresentation of a present material fact or state. Such is the principle announced in Albitz v. Minneapolis & Pac. Ry. Co. 40 Minn. 476, 478, 42 N. W. 394, in this language:

"But if the agent, in making those representations, intended to create in plaintiffs the belief that it was, as a fact, the then intention of the defendant to do the things mentioned, and the representations might be understood, and were understood by plaintiffs, as asserting that fact, then a charge of fraud can be based upon the representations."

There is no merit in the criticism of the court's instruction to the effect that, if plaintiff led an impure life prior to the alleged promise of marriage, it would not be a defense, but could be considered only as bearing on the credibility of her evidence and in mitigation of damages. Defendant denied the promise. Except as indicated by the court, plaintiff's prior life would constitute a defense only by way of confession and avoidance; that is, when a promise of marriage is made by one party, in ignorance of the unchaste character of the other party to the engagement, the contract may be avoided by the

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one who through excusable ignorance became bound, or, in other words, the previous unchaste life of one of the contracting parties may be a valid defense in an action for breach of promise to marry, but in order to be a defense it must be pleaded as such. Kniffen v. McConnell, 30 N. Y. 285; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422.

It is plain that, if the defendant knew of the bad character of plaintiff when he promised to marry her, her life and character could in no event avoid the contract or excuse nonperformance. Even those of bad repute and vile life, if otherwise capable of contracting marriage, have the legal right to make a valid promise to marry. In this case the promise to marry was denied by defendant, and no attempt was made to plead any ground for avoiding the promise, if made, or excusing a breach thereof.

We deem it unnecessary to discuss any other error assigned. None are vital to a determination of the case, nor are any of those now urged likely to arise at another trial. For the error pointed out, considered in connection with the whole record and the strong showing by defendant of newly discovered evidence, we conclude that a new trial should be had.

The order, in so far as it denied judgment notwithstanding the verdict, is affirmed; but, in so far as it denied a new trial, it is reversed, and a new trial is granted.

DARWIN D. PARKS v. JOHN BYRNE and Others.[1]

December 20, 1912.

Nos. 17,796—(113).

Tort.

An unlawful interference with a lawful right to abide in a home selected by plaintiff and his wife is an actionable wrong, entitling them to recover for such damages as are shown to have proximately resulted therefrom. [Reporter.]

[1] Reported in 138 N. W. 952.

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Action in the district court for Renville county to recover $20,500 for conspiracy to compel plaintiff and his wife to remove from their place of residence, and for trespass upon plaintiff's premises and intimidation of him and his wife. From an order, Qvale, J., overruling defendants' demurrer to the complaint, they appealed. Affirmed.

J. M. Freeman, for appellants.

Homer Morris, for respondent.

PER CURIAM.

This is an appeal from an order overruling a demurrer to a complaint alleging in substance that plaintiff and his wife were in possession of a dwelling house and appurtenances in Morton, Minnesota, wherein they made their home; that the defendants conspired together to use threats to cause plaintiff and his wife to remove from Morton and prevent them from living in that village, contrary to their desires and interests; that pursuant to such conspiracy, and at the direction of one of the defendants, the others, with malice, and to put plaintiff and his wife in fear, entered and trespassed upon plaintiff's premises and invaded his home in an angry and threatening manner, and threatened to visit upon plaintiff and his wife great bodily and personal injury if they did not leave their home and said village; and that by reason thereof plaintiff and his wife were compelled to remove from their home, and his work, which removal caused certain specified expenses, inconvenience, and loss.

The contention of defendant is that, there being no physical assault or injury, the fear produced by mere threats does not constitute actionable wrong. But a fair construction of the pleading indicates a trespass in the nature of a wrongful invasion of the home. Plaintiff and his wife had a lawful right to abide in the home they selected, unmolested by threats and intimidations wrongfully designed to drive them away. Lesch v. Great Northern Ry. Co., 97 Minn. 503, 106 N. W. 955, 7 L.R.A.(N.S.) 93. An unlawful interference with this right is an actionable wrong, entitling to a recovery for such damages as are shown to have proximately resulted therefrom. It is unnecessary now to discuss whether threats alone, which caused no actual injury, damage, or loss, are actionable.

Order affirmed.

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FRANCES PARKS v. JOHN BYRNE and Others.[1]

December 20, 1912.

Nos. 17,797—(114).

Case followed.

Parks v. Byrne, supra, page 519, followed. [Reporter.]

Action in the district court for Renville county to recover $20,000 for conspiracy to slander and circulate false and defamatory reports against defendant and compel her to leave her home. From an order, Qvale, J., overruling defendants' demurrer to the complaint, they appealed. Affirmed.

J. M. Freeman, for appellants.

Homer Morris, for respondent.

PER CURIAM.

The complaint herein is an alleged cause of action by the wife for the same wrongs for which her husband brought an action, wherein his complaint was sustained against a demurrer. Parks v. Byrne, supra, page 519. Her complaint is substantially the same as his, and must be upheld as stating a cause of action.

Order affirmed.

GAMBLE-ROBINSON COMMISSION COMPANY v. JOHN L. WHITAKER and Another.[2]

December 27, 1912.

Nos. 17,767—(111).

Conversion — burden of proof.

The court did not err in charging the jury that defendants had the burden of proving their good faith in the ownership of a warehouse receipt, and did not err in submitting certain questions to the jury. The verdict was supported by the evidence. [Reporter.]

[1] Reported in 138 N. W. 952.

[2] Reported in 138 N. W. 1033.

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Action for conversion. After the former appeal, reported in 116 Minn. 79, 133 N. W. 167, the case was tried before Hallam, J., who directed the jury that if plaintiff was entitled to recover it was entitled to recover $1080, and interest thereon. The jury returned a verdict in favor of plaintiff. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

John R. Donohue, for appellants.

Walter Holsinger, for respondent.

PER CURIAM.

This action has been before the court on two former appeals. 111 Minn. 452, 127 N. W. 448; 116 Minn. 79, 133 N. W. 167. The facts are there fully stated, and a restatement is deemed unnecessary. The questions presented on the different trials were practically the same, namely: (1) Whether the defendants were joint purchasers of the eggs, or whether the Peifer Company was their agent in the purchase; and (2) whether if not so purchased, defendants were bona fide holders of the warehouse receipt.

Our examination of the record leads to the conclusion that these questions were properly submitted to the jury and that the evidence supports the verdict. Under the facts disclosed, the trial court did not err in charging the jury that defendants had the burden of establishing the good faith of their ownership of the warehouse receipt.

Order affirmed.

JOHN J. BERRY v. M. J. KOLB.[1]

January 3, 1913.

Nos. 17,867—(132).

Fraud — complaint sufficient against a demurrer.

The allegation that defendant, by means of the fraud set out in the complaint, obtained from and converted a certain sum of plaintiff's money, is a sufficient allegation of damages, as against a demurrer.

Action in the district court for Clearwater county to recover $7,297.30, the value of money orders obtained from plaintiff by fraud. From an order, McClenahan, J., overruling defendant's demurrer to the complaint, he appealed. Affirmed.

[1] Reported in 139 N. W. 138.

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William A. McGlennon, for appellant.
Marshall A. Spooner, Thomas Keefe and *John R. Coan*, for respondent.

PER CURIAM.

This is an appeal by defendant from an order overruling his demurrer to the complaint.

The claim of the defendant is that the complaint does not allege that plaintiff was damaged by the fraudulent acts of defendant complained of, and that, as damages are the gist of an action for deceit, the complaint does not state a cause of action. But, liberally construed, the complaint does allege that plaintiff was damaged by the fraud of defendant. The allegation that defendant, by means of the fraud, obtained from and converted $7,297.30 of plaintiff's moneys, is a sufficient allegation of damages, as against a demurrer.

Order affirmed.

JOHN W. McCLURE v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.[1]

January 3, 1913.

Nos. 17,897–(125).

Question for jury.

Action for the destruction of plaintiff's sawmill by fire started by an engine of defendant. *Held:* The evidence warranted submitting to the jury the question whether the fire was so started. [Reporter.]

Action in the district court for Mille Lacs county to recover $8,950 for loss of a sawmill by fire. The complaint alleged that on a specified day defendant, while running its steam engine with trains of cars attached over its line of railroad through the village of Onamia, negligently permitted to escape from the engine sparks of fire and burning cinders, which were scattered and carried to plaintiff's premises, setting fire to plaintiff's building, and notwithstanding his efforts to save it, the property was destroyed including the building, platforms, machinery, tools and lumber; that the fire was due solely to the negligence of defendant and its employees and to the imperfect and unsafe condition of the engine. The answer denied the allegations of the complaint and prayed that the action be dismissed. The case was tried before Nye, J., and a jury which returned a verdict in favor of plaintiff for $600. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

[1] Reported in 139 N. W. 1134.

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John G. Erdall, H. B. Fryberger, L. K. Eaton and *Alfred H. Bright*, for appellant.

Land & Malmberg, for respondent.

PER CURIAM.

This is an action to recover for the destruction of plaintiff's saw mill by a fire claimed to have been set by an engine of defendant. There was a verdict for $600 in favor of plaintiff. Defendant moved for judgment notwithstanding the verdict. This was denied, and defendant appeals from the judgment thereafter entered on the verdict.

The sole question is whether there was any evidence that warranted the submission to the jury of the question whether the fire was started by an engine of defendant. We have examined the record and find evidence making the question one for the jury to determine. A statement of the evidence here would serve no useful purpose.

Judgment affirmed.

SAMUEL D. CROZIER v. B. F. NELSON MANUFACTURING COMPANY.[1]

January 17, 1913.

Nos. 17,829—(182).

Discretion of court not abused.

Motion by defendant for stay of all proceedings until plaintiff paid judgments for costs against him in two other actions between same parties was denied, and defendant appealed. It appeared by inference that plaintiff conceived he was defeated in the other actions on the ground a contract of yearly hiring came within the statute of frauds, and could not be performed within one year from the time it was made. In the present action he alleged the contract was made two days later. *Held:* The court exercised its judicial discretion in deciding the motion and the record does not affirmatively show an abuse of discretion. The defendant was not entitled to the stay as a matter of absolute right. [Reporter].

Defendant moved for an order of the district court for Hennepin county staying all proceedings in the action until plaintiff paid defendant $74.71, the amount of two judgments for costs recovered by defendant against plaintiff in two other

[1] Reported in 139 N. W. 353.

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actions in the municipal court of Minneapolis, and to extend defendant's time to answer. The ground of the motion was that defendant could not collect the judgments by execution and levy, for the reason that plaintiff was execution proof; that defendant had been put to great expense defending the actions in the municipal court and would be put to great expense in defending the present action; that the bringing of this action was vexatious and harassing to defendant and the same was brought for the purpose of harassing defendant and to put it to additional expense. Defendant obtained from the court an order requiring plaintiff to show cause why the court should not issue an order staying proceedings until the payment by defendant of the two judgments for costs. The motion was heard by Steele, J., who denied the motion as to the payment of the judgments and granted defendant a stay for twenty days to answer the complaint. From the order denying the motion to stay proceedings, defendant appealed. Affirmed.

William A. Tautges, for appellant.

Larrabee & Davies, for respondent.

PER CURIAM.

In this case the defendant moved the court below for an order staying all proceedings therein until plaintiff paid the judgments for costs rendered against him in two actions brought in the municipal court of Minneapolis by plaintiff against this defendant, and for leave to answer within 20 days after such judgments were paid. The motion was denied as to the stay, and defendant appeals.

Plaintiff in this action alleged that on April 17, 1911, he was employed by defendant for one year at a certain salary, payable in monthly instalments; that on October 1, 1911, he was discharged without cause, and thereafter he was unable to obtain other employment, and asks damages for the loss in wages for the months of October, November, and December, 1911, and for January, February, and March, 1912. The defendant's showing on the motion was that plaintiff, on November 4, 1911, brought an action in said municipal court against defendant for damages for loss of wages during October, 1911, and subsequently, in January, 1912, another action was brought by plaintiff against defendant in said municipal court for damages for the loss of wages for the months of November and December, 1911. These actions were tried, and resulted in judgment for costs in each case against plaintiff, which are still unpaid. By inference it is made to appear that plaintiff conceived that he was defeated in the municipal court on the ground that the contract came within the statute of frauds, in that it could not be performed in one year from the time it was made on April 15, 1911, as alleged in the complaints in those cases. Now, in the instant case, plaintiff alleges that the contract was made two days later.

Without considering or deciding whether the order is appealable, we conclude that the order must be affirmed on the merits. The court, in an order upon a motion of the character here presented, exercises judicial discretion, and the rec-

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ord does not affirmatively show any abuse of discretion. It is not made to appear that defendant was entitled to a stay as a matter of absolute right. While the existence of a valid contract of employment for one year must be the basis for the damages accruing to plaintiff for each instalment of wages, still the damages sought in the present action for the months of January, February, and March, 1912, may constitute a separate cause of action from those tried in the municipal court. McMullan v. Dickinson Co. 60 Minn. 156, 62 N. W. 120, 27 L.R.A. 409, 51 Am. St. 511.

The order is affirmed.

STATE ex rel. TEOFILA LIJESKI v. DISTRICT COURT OF BIG STONE COUNTY.[1]

January 20, 1913.

Nos. 18,029–(274).

Venue — local action.

An action to set aside deeds executed and delivered by plaintiff to defendant, on the ground that they were procured by fraud and misrepresentation of defendant, and that by decree the title be reinvested in her, in which defendant sets up in his answer a counterclaim, alleging ownership of the lots conveyed, is local, and not transitory, and should be tried in the county where the land is located. [Reporter].

Teofila Lijeski, plaintiff in an action against Kashmir C. Frozina, moved the district court for Big Stone county for an order remanding the action to the district court for Ramsey county, from which it had been removed. The order was denied by Flaherty, J. Plaintiff thereupon obtained from this court an order directing the judge and clerk of the district court for Big Stone county to show cause why a peremptory writ of mandamus should not issue, directing them to remand the action to the district court for Ramsey county. The matter was heard upon the relation of plaintiff and the return. Peremptory writ to issue.

Newgren & Bjorklund, for relator.

F. W. Murphy, for respondents.

[1] Reported in 139 N. W. 613.

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PER CURIAM.

The district court of Big Stone county denied relator's motion to remand an action begun by her in the district court of Ramsey county against one Frozina, and which had been removed under the provisions of section 4096, R. L. 1905, to the district court of Big Stone county. The relator thereupon obtained from this court an order to show cause why a peremptory writ of mandamus should not issue directing the judge and clerk of the district court of Big Stone county to remand said cause to the district court of Ramsey county.

The complaint in the action involved states that plaintiff on a day certain owned two lots, describing them, in the city of St. Paul, Ramsey county, Minnesota; that on said day she executed and delivered to defendant, as grantor, two deeds thereby conveying said lots to him; that ever since defendant has been in possession of and has collected the rent from said lots. It is also alleged that said deeds were procured by fraud and misrepresentation of defendant, that plaintiff received no consideration for, and did not intend to convey the property to defendant, nor did she know the character of the instruments. She asks that the deeds be declared null and void, and that by decree in the action the title to said estate be reinvested in her.

We are of opinion that the action is local, and not transitory. The purpose is to restore the title to plaintiff in land in the possession of defendant. It is not similar to the case of State v. District Court of Pine County, 94 Minn. 370, 102 N. W. 869, 3 An. Cas. 725, where a vendor brought an action to cancel a contract for conveyance of real estate and recover what was paid thereon. Therein it did not even appear that the fraudulent vendor owned the land.

The defendant in the action here involved is in no position to resist relator's contention that the action is local, for he sets up in his answer a counterclaim alleging ownership of the lots, that plaintiff asserts some title or claim to them, and asks the court to adjudge the title in him free from any claim of plaintiff. In Smith v. Barr, 76 Minn. 513, 79 N. W. 507, it is said: "We are quite clear that if all the lands sold at the administrator's sale were still held by the original purchasers, and the only relief asked was to compel them to reconvey the lands, the action would have to be brought in a county where some part of the situated lands is situate." The primary object of the action is the title and ownership of land in Ramsey county. State v. District Court of Clay County, supra, page 99, 139 N. W. 135.

Let a peremptory writ issue.

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CLARA SINGER v. COURT OF HONOR.[1]

January 24, 1913.

Nos. 17,547–(146).

Case followed.

Defendant appeared specially for the purpose of the motion only and moved the municipal court of St. Paul to vacate (1) the service of summons and complaint, (2) the return of service of the summons and complaint, and (3) judgment entered in favor of plaintiff for $547.25. The ground of the motion was that the court did not acquire jurisdiction in the action over the defendant. The motion was denied, Finehout, J. From the order denying the motion, defendant appealed. Reversed.

Spooner, Laybourn & Lucas and *William B. Risse*, for appellant.

A. J. Hertz, for respondent.

PER CURIAM.

This action and Juster v. Court of Honor, supra, page 325, 139 N. W. 701, are twin cases.

For the reasons stated in the opinion referred to, the order appealed from is reversed.

JOSEPH J. SLOCUM and Another v. TORGER CHRISTIANSON.[2]

January 24, 1913.

Nos. 17,779–(144).

Public land — waiver of right.

The fact that, after a homesteader had settled upon public land within the indemnity limits of a railroad land grant and tendered a filing upon a quarter section, he again tendered a homestead application limited to three 40-acre tracts of the quarter section, is not a waiver or abandonment of his rights under the former application so far as concerns the 40-acre tract not included in the second application. [Reporter].

[1] Reported in 139 N. W. 703.

[2] Reported in 139 N. W. 599.

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Action of ejectment in the district court for Chippewa county by the assignees in trust of the Hastings & Dakota Railway Company. The action was tried before Qvale, J., who made findings and ordered judgment that defendant was the equitable owner of the land and entitled to the possession thereof. From the judgment entered pursuant to the order for judgment, plaintiffs appealed. Affirmed.

Owen Morris, for appellants.

C. A. Fosnes and *Alfred K. Fosnes*, for respondent.

PER CURIAM.

This action involves the same questions as were presented in Kinyon v. Christianson, supra, page 335, 139 N. W. 597, and the same conclusion is reached. The judgment appealed from is affirmed.

The land involved in both actions is the northwest quarter of section 13, township 119, range 40, Chippewa county. Defendant settled upon the land and tendered a filing upon the quarter section. After the second selection of the railroad company had been approved by the Interior Department, defendant again tendered a homestead application, limited to three 40-acre tracts of the quarter section. It is contended that by this action defendant waived and abandoned all rights under the former application so far as concerns the 40-acre tract not included in the last application. We do not sustain this contention. Defendant's right to the whole quarter section became vested by his first application, if at all, and by that he must stand or fall. This action involves the title to the three forties referred to, while the 40-acre tract not included in the subsequent homestead application is alone involved in the Kinyon case.

Judgment affirmed.

HARRIET MAYCROFT v. LUELLA B. MAYCROFT.[1]

January 24, 1913.

Nos. 17,880—(157).

Finding sustained by evidence.

A finding that a claimant for the value of services rendered to the intestate,

[1] Reported in 139 N. W. 1134.

Note.—The authorities on the question of the implication of an agreement to pay for services rendered by relative or member of household are discussed in an elaborate note in 11 L.R.A.(N.S.) 873.

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her brother, was received and remained as a member of his family, without any agreement that her services were to be compensated, was sustained by the evidence. [Reporter].

From a judgment entered in the district court for Winona county pursuant to the order of Snow, J., in favor of the administratrix and against Harriet Maycroft, the claimant, the latter appealed. Affirmed.

Buck & Fitzpatrick, for appellant.

William Burns, for respondent.

PER CURIAM.

Appellant filed a claim against the estate of her deceased brother for services. The probate court allowed the same in part, and the administratrix appealed to the district court, where, upon trial, a decision was rendered and judgment entered disallowing the claim in toto, and reversing the probate court. From such judgment this appeal has been taken.

The appeal presents no question of law. The findings of the trial court to the effect that claimant was received and remained as a member of the family of her deceased brother, and that there was no express or implied agreement that she should receive compensation for any services she did render for her brother while so residing with him, are amply sustained by the evidence. No useful purpose will be served by a recital or discussion of the testimony.

Judgment affirmed.

FRED ORTH and Another v. TOWNSHIP OF NORFOLK and Others.[1]

January 24, 1913.

Nos. 17,898–(238).

Highway — finding sustained by evidence.

In an action to enjoin the laying out or working a highway over the land of plaintiffs, a finding that a road at the place in question had been used or worked for six years continuously as a public highway, and there was no public road at the place, was sustained by the evidence. [Reporter.]

Action in the district court for Renville county to adjudge that a certain road was not legally laid out or established and to restrain defendant township and its

[1] Reported in 139 N. W. 1134.

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supervisors from laying out, working, or constructing a highway over the line of road described in the complaint where it crossed the land of plaintiffs. The answer alleged that the road in question had been well traveled for more than 10 years and had been kept in repair and worked continuously by the supervisors of defendant township. The case was tried before Powers, J., who found there was no public road at the place in question and ordered judgment in favor of plaintiffs, perpetually restraining defendants from opening or working a highway thereat. From an order denying defendants' motion for a new trial, they appealed. Affirmed.

J. M. Freeman, for appellants.

Murray & Baker and *John A. Dalzell* for respondents.

PER CURIAM.

Action to enjoin defendants from laying, working, or constructing a highway over land owned by plaintiffs. The case was tried to the court, and resulted in a decision in plaintiffs' favor. Defendants appealed from an order denying a new trial.

In 1895 the town supervisors attempted to lay out the highway in question, but admittedly the proceedings were fatally defective. The only defense to the present action was that there was a highway by more than six years use and working under R. L. 1905, § 1197. The trial court found that no road or portion thereof had been used or kept in repair and worked for six years continuously as a public highway along or on the section line where it was claimed to exist, and that there was no public road on said line or any part of it. The only question for our decision is whether this finding is sustained by the evidence. Our examination of the record leads us to the conclusion that this question must be, and it is, answered in the affirmative.

Order affirmed.

F. B. McLAREN v. GREAT NORTHERN RAILWAY COMPANY.[1]

January 31, 1913.

Nos. 17,806–(177).

Damages not excessive.

Verdict for $2,000 in an action for personal injury. Plaintiff was a farmer and lectured at farmers' institutes. If the testimony was true that he was

[1] Reported in 139 N. W. 621.

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suffering from traumatic neurosis and, under ordinary treatment, would recover in two years from the time of the accident, the damages were not excessive. The question was one of fact for the jury and their verdict was sustained. [Reporter.]

Action in the district court for Carlton county against Northern Pacific Railway Company and Great Northern Railway Company to recover $15,975 for personal injury. The case was tried before Cant, J., and a jury which returned a verdict against the Great Northern Railway Company for $2,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, the Great Northern Railway Company appealed. Affirmed.

Baldwin & Baldwin, for appellant.

C. R. Magney and *John Jenswold, Jr.*, for respondent.

PER CURIAM.

This action is brought to recover damages for personal injury to plaintiff by reason of a collision between trains. The jury found for plaintiff, and assessed his damages at $2,000. The only question raised on this appeal is that these damages are excessive.

The evidence showed that a fellow passenger was thrown against plaintiff, forcing him against the window casing of the car. Plaintiff claims to have suffered much pain, and to have been largely disabled from following his usual vocation, that of farmer and lecturer at farmers' institutes. Plaintiff's expert physician testified that plaintiff was suffering from traumatic neurosis caused by the collision, and that under ordinary treatment he would recover entirely in a year from the time of the trial. This would be about two years from the time of the injury. It is conceded that, if plaintiff's evidence as to his subjective symptoms is true, then this diagnosis is correct. If the testimony in behalf of plaintiff as to the nature of the injury and as to the extent of plaintiff's disability be true, the damages are not excessive. The whole question is one of fact for the jury, and we cannot disturb their verdict.

Order affirmed.

MARTIN EVENSTAD v. CARL STEVENS.[1]

February 7, 1913.

Nos. 17,929–(217).

Damages not excessive.

Verdict of $500 in an action for assault and battery. *Held:* The damages

[1] Reported in 139 N. W. 1134.

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seem large, considering the character of the injuries complained of, but since the trial court approved the verdict, this court does not see its way clear to interfere. [Reporter].

Action in the district court for Norman county to recover $2,500 for assault and battery. The answer was a general denial. The case was tried before Grindeland, J., and a jury which returned a verdict of $500 in favor of plaintiff. From an order denying a new trial, defendants appealed. Affirmed.

Lambert Prigge and *W. E. Rowe*, for appellants.

M. A. Brattland, for respondent.

PER CURIAM.

Action for assault and battery. Plaintiff had a verdict, and defendant appealed from an order denying a new trial. The question whether the verdict is excessive presents the only question requiring serious consideration. We have examined the alleged errors in law, and discover nothing to justify a new trial or an extended opinion. The errors complained of are not of a substantial nature, and resulted in no prejudice to defendant, if error in fact be conceded.

Upon the question of damages we have had some doubt The damages seem large, considering the character of the injuries complained of; but, since the trial court has approved the verdict, we cannot see our way clear to interfere.

Order affirmed.

WILLIAM C. HOPKINS v. MILACA STATE BANK and Another.[1]

February 7, 1913.

Nos. 17,941–(186).

Case followed.

Action in the district court for Mille Lacs county to recover $5,000 for false imprisonment. The pleadings are substantially the same as in the case of Peake v. Milaca State Bank, supra, page 455, 139 N. W. 813. The case was tried before Taylor, J., who denied defendants' motion to direct a verdict in their favor, and a jury which returned a verdict for $300. From an order denying defendants' motion for judgment notwithstanding the verdict, they appealed. Affirmed.

[1] Reported in 139 N. W. 814.

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McDonald, Bernhagen & Patterson, for appellant.
Charles L. Lewis, J. H. Whiteley and *E. L. McMillan*, for respondent.

PER CURIAM.

The only material difference between this case and that of Peake v. Milaca State Bank, supra, page 455, 139 N. W. 813, is that the sheriff actually served the defective warrant on the plaintiff, Hopkins, took him into custody, and brought him before Justice of the Peace Dickey at Princeton, before whom the warrant was made returnable. The justice, however, refused to hear the matter and disclaimed jurisdiction. It is clear that here was a termination of the prosecution, without any opportunity for plaintiff to vindicate himself.

Order affirmed.

EMMA LARSON v. W. H. CURRAN.[1]

February 17, 1913.

Nos. 17,805–(204).

No appeal from findings of trial court.

This court has no jurisdiction where an appeal is taken from findings of fact and conclusions of law, without a motion for a new trial or the entry of judgment ordered. [Reporter].

Emma Larson appealed to the district court for Lyon county from two orders of the probate court for that county, one an order granting defendant, as administrator with the will annexed of the estate of Martin Norseth, deceased, license to sell real estate, and the other an order confirming the sale. The appeals were heard together by Olsen, J., who made findings of fact and ordered judgment overruling the orders of the probate court. From that order W. H. Curran, as administrator, appealed. Appeal dismissed.

Charles J. Trawler, for appellant.
James H. Hall, for respondent.

PER CURIAM.

This is another attempt to appeal from findings of fact and conclusions of law without making a motion for a new trial or entering the judgment ordered. This court has no jurisdiction, and the appeal is dismissed.

[1] Reported in 134 N. W. 1134.

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VIOLA CROTTY v. GREAT NORTHERN RAILWAY COMPANY.[1]

February 21, 1913.

Nos. 17,824-(211).

Complaint sufficient.

A complaint which alleged in substance that defendant negligently furnished deceased with a defective monkey wrench to use in adjusting an air pump on a locomotive, that defendant had been notified of the defect, that by reason of such defect the wrench slipped while decedent was using it, he was thrown to the ground and sustained injury from which he died, is a sufficient pleading of actionable negligence. [Reporter].

Assumption of risk.

The question whether the workman assumed the risk is a matter of defense. If the assumption of risk appears affirmatively from the facts of the complaint, the question can be raised by demurrer. The complaint in this case does not show as a matter of law decedent assumed the risk from using a defective monkey wrench. [Reporter].

Action in the district court for Cass county. Defendant demurred to the complaint. From the order overruling the demurrer, Stanton, J., defendant appealed. Affirmed.

M. L. Countryman and *J. A. Murphy*, for appellant.

B. A. Flynn, for respondent.

PER CURIAM.

This is an appeal from an order overruling a demurrer to the complaint. It is alleged in substance that the defendant negligently furnished deceased with a defective monkey wrench for use in adjusting an air pump upon a locomotive

[1] Reported in 139 N. W. 948.

Note.—As to the liability of the master for injury by defect in common tools, see notes in 13 L.R.A.(N.S.) 668, and 40 L.R.A.(N.S.) 832.

On the question of the assumption of obvious risks of hazardous employment, see note in 1 L.R.A.(N.S.) 272. As to servant's assumption of risks of danger imperfectly appreciated, see note in 4 L.R.A.(N.S.) 990. And for servant's assumption of risk from latent danger or defect, see note in 17 L.R.A.(N.S.) 76.

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engine, that defendant had been notified of the defect, that by reason of such negligent defect the wrench slipped while deceased was using it, and he was thrown to the ground and sustained injury from which he died. This is sufficient pleading of actionable negligence.

Appellant contends that it conclusively appears from the allegations of the complaint that deceased had assumed the risk incident to the use of this defective wrench. We cannot so hold.

It does not appear that deceased had ever used the wrench before. The circumstances under which it was furnished to him on this occasion do not appear. It does not conclusively appear that he knew of the defect, or had opportunity to observe it. None of these things will be presumed. Assumption of risk is a matter of defense. While the question may be raised by demurrer, if the assumption of risk appears affirmatively from the face of the complaint, we cannot hold that the facts pleaded in this complaint show as a matter of law that deceased assumed the risks incident to the use of the wrench.

Order affirmed.

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ACCOUNTING. See JOINT ADVENTURE, 1, 2; TRUST, 4–7; VENUE, 3.

ACKNOWLEDGMENT. See MORTGAGE, 7.

ADVERSE CLAIMS. See EQUITY, 1; MORTGAGE, 1.

Actions to determine adverse claims may be either of legal or equitable cognizance, according to the facts.
—Mason v. Fichner, 192.

ADVERSE POSSESSION. See EJECTMENT.

1. Adverse possession of land may be shown by a variety of acts dependent on its location, future and beneficial uses to which it may be reasonably applied; but they must be such as clearly to indicate that a permanent occupation and appropriation of the land in hostility to the true owner is intended. There may be, in exceptional cases, adverse possession without either buildings, fences or actual residence on the land.
—Gaston v. May, 156.

2. The mere fact that a fence was removed after 14 years and 7 months, during which the enclosure was so used as to constitute adverse possession, leaving the posts intact, does not justify the inference that the continuity of the adverse possession was interrupted.
—Gaston v. May, 157.

AGRICULTURE.

Under Laws 1911, p. 530, c. 381, a duly incorporated agricultural society is entitled to state aid in preference to an agricultural co-operative society subsequently incorporated as successor of an unincorporated street fair association which had held fairs and received state aid under prior statutes which were repealed by Laws 1911, p. 389, c. 280.
—State ex rel. v. Iverson, 252, 253, 254.

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AMBASSADOR AND CONSUL.

1. Applying the rule that the court may look to the history of a statute as one guide in its interpretation, *held* that, where an application is made for administration upon the intestate estate of a foreigner dying in this state, the notice provided for by R. L. 1905, § 3642, should be given.
—Austro-Hungarian Consul v. Westphal, 122.

2. Under R. L. 1905, § 3696, a foreign consul, who resides in this state and who has filed a copy of his appointment with the Secretary of State, is, next after the surviving spouse or next of kin, entitled to be appointed administrator of the estate of one of his deceased nationals dying in this state, or to nominate the person to be appointed, provided that he be suitable and competent to discharge the trust, and that he apply for administration within 30 days after receiving the notice provided for by section 3642; but otherwise the statute gives him no preference whatever.
—Austro-Hungarian Consul v. Westphal, 123.

3. *Quære*: Whether the "most favored nation clause" in a treaty between the United States and a foreign nation carries the benefit of a provision of a consular convention between the United States and another country, conferring upon the representatives of the parties thereto the right to administer upon the estates of their deceased nationals.
—Austro-Hungarian Consul v. Westphal, 123.

4. Article 14 of the treaty between the United States and Sweden, proclaimed March 20, 1911 (37 Stat. 175), purports to give to the consuls of the parties thereto the right to administer upon the estates of their deceased nationals only "so far as the laws of each country will permit;" and hence any right thereby conferred upon a foreign consul, under the "favored nation clause," with respect to the administration of the estate of one of his deceased nationals dying in Minnesota, is expressly subject to the conditions imposed by the laws of this state.
—Austro-Hungarian Consul v. Westphal, 123.

5. A foreign consul cannot, as such, assert the priority of right of administration conferred by R. L. 1905, § 3696, subd. 1, upon the surviving spouse or next of kin of one of his deceased nationals.
—Austro-Hungarian Consul v. Westphal, 123.

6. A foreign consul, as such, has a proper status to intervene in and to become a party to proceedings upon an application to appoint an administrator of the estate of one of his deceased nationals dying in this state, and likewise may appeal from the order of the court making the appointment.
—Austro-Hungarian Consul v. Westphal, 124.

7. Without express appointment, a foreign consul cannot be considered either as the nominee, or entitled to assert the right of the widow and minor

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AMBASSADOR AND CONSUL—Continued.
children of a decedent of his nation to priority to appointment as administrator, so as to dispense with their application for administration.
—Austro-Hungarian Consul v. Westphal, 141.

APPEAL AND ERROR. See MUNICIPAL CORPORATION, 5.

WHEN APPEAL CAN BE TAKEN.

See PHYSICIAN AND SURGEON.

1. In an action for a permanent injunction, tried to the court, where findings of fact and conclusions of law are made that plaintiff is entitled to judgment restraining and enjoining defendants, the order for judgment is not appealable.
—Holliston v. Ernston, 507.

2. This court has no jurisdiction where an appeal is taken from findings of fact and conclusions of law, without a motion for a new trial or the entry of judgment ordered.
—Larson v. Curran, 534.

ASSIGNMENT OF ERROR.

3. In this action by creditors of a corporation to recover of stockholders thereof unpaid stock subscriptions, it is *held* that the point that a judgment obtained by one of the plaintiffs against the corporation was rendered without jurisdiction of the defendant is not available to appellants here, there being no assignment of error challenging the finding that such judgment was duly recovered.
—Randall Printing Co. v. Sanitas Mineral Water Co. 268.

4. Where defendant failed to call the attention of the trial court to a defect in a charge by request to charge or otherwise, he cannot on appeal avail himself of the error.
—Cox v. Edwards, 516.

5. Contention that the complaint failed to state a cause of action *held*, in any event, too late when made for the first time on appeal.
—Travelers Indemnity Co. v. Fawkes, 354.

DISMISSAL OF APPEAL.

6. When the order appealed from is not appealable, this court is without jurisdiction, and the appeal should be dismissed.
—Holliston v. Ernston, 508.

QUESTIONS NOT REVIEWABLE BECAUSE OF PARTIAL RECORD.

7. A witness testified as to amounts realized from sale of a consignment by reference to a memorandum, and the memorandum was offered in evidence by the opposite party to show it was not a book of original entry, but a memorandum made by another person. The memorandum not

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APPEAL AND ERROR—Continued.

being made a part of the settled case or returned to this court, this court cannot rule on its propriety as a memorandum.

—Ammon v. Illinois Central Railroad Company, 441, 442.

8. This court cannot hold the rejection of an offer of evidence to be error when pertinent facts which were before the trial court are not in the return to this court or in the paper book or briefs. Rule applied in the case of an action to avoid a decree allowing a trustee's account.

—Wann v. Northwestern Trust Co. 505.

OTHER QUESTIONS NOT REVIEWABLE.

9. An objection to the admission of evidence, which was not made at the trial, cannot be considered on appeal.

—Langdon v. Minneapolis Street Railway Co. 10, 11.

10. There is no ground for reversal, where alleged misconduct of counsel in addressing the jury was not directly called to the attention of the trial court, a ruling invoked, or exception noted.

—Langdon v. Minneapolis Street Railway Co. 12.

11. Action for wrongful death at railway crossing. The complaint alleged merely that defendant was negligent in the operation of its train. In its charge to the jury the trial court limited plaintiff's claim as to defendant's negligence solely to the alleged failure to give the statutory signals, thus rendering claims not so submitted immaterial. *Held:* This court on appeal will not consider other grounds of negligence.

—Tegels v. Great Northern Railway Co. 33.

12. On appeal defendant cannot claim an instruction that the jury could consider whether plaintiff's condition was likely to be permanent, or more or less permanent, was reversible error, when it had neither asked for an instruction as to the degree of proof required to justify an award for permanent injury, or to call the court's attention to its failure to give the rule.

—Hedlund v. Minneapolis Street Railway Co. 324.

DISCRETION OF TRIAL COURT.

13. Motion by defendant for stay of all proceedings until plaintiff paid judgments for costs against him in two other actions between same parties was denied, and defendant appealed. It appeared by inference that plaintiff conceived he was defeated in the other actions on the ground that a contract of yearly hiring came within the statute of frauds, and could not be performed within one year from the time it was made. In the present action he alleged the contract was made two days later. *Held:* The court exercised its judicial discretion in deciding the motion and

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APPEAL AND ERROR—Continued.

the record does not affirmatively show an abuse of discretion. The defendant was not entitled to the stay as a matter of absolute right.

—Crozier v. B. F. Nelson Manufacturing Co. 524.

PREJUDICIAL ERROR.

14. Unless error in substance is found, so that this court can say that, had the instruction challenged not been given, the result might have been different, it should not be held to have been prejudicial.

—Pelowski v. J. R. Watkins Medical Co. 117.

15. Where there is an omission or defect in the charge upon a material issue, namely, in not stating that, where it is sought to avoid a release pleaded as a defense to a contract on the ground that it was procured by fraud and duress, the burden is upon the plaintiff to prove the fraud or duress by clear and satisfactory evidence, the inference is strong that prejudice results from the refusal to give a request correctly stating the law upon a matter bearing on such issue.

—Cox v. Edwards, 512.

16. The refusal to give such request, which was to the effect that, "in order to find duress in this case, you must find that there was such pressure or constraint as compelled the plaintiff to go against her will, and such as took away her free agency and destroyed her power of refusing to sign the release," *held* reversible error, in view of the evidence in the case.

—Cox v. Edwards, 512.

17. Where a verdict has but doubtful or meagre support in the evidence, the inference of prejudice from errors in rulings or inadequate instructions becomes persuasive and strong.

—Cox v. Edwards, 514.

HARMLESS ERROR.

18. A witness gave testimony from an unverified memorandum, when objected to on that ground, only as to a matter not in controversy. *Held* no material error.

—B. Presley Co. v. Illinois Central Railroad Co. 295.

19. Action to recover earnest money paid upon a land contract. *Held:* There was no reversible error in the findings, or in the rulings on the admission of evidence.

—Williams v. Gilbert, 300.

20. Where the facts litigated were known to the defendant, a variance, if any, between the plaintiff's complaint and his proofs *held* harmless. So also was the action of the trial court in allowing an amendment of the complaint in formal particulars to conform to the proofs.

—Travelers Indemnity Co. v. Fawkes, 354, 359.

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APPEAL AND ERROR—Continued.

EVIDENCE.

21. The duty to determine the issues of fact is by law laid upon the trial court, where there is no jury; and the appellate court may not interfere, save to ascertain whether the record presents evidence which fairly sustains the findings, even when the evidence consists of admissions, documents and depositions.

—Carpenter v. United States Express Co. 61, 62.

22. This court is not required to reconcile conflicting evidence, nor to solve doubts arising therefrom. It has only to determine whether the evidence, taken as a whole, fairly tends to support the jury. It was for the jury and the trial court to determine the facts. If there be evidence in the record fairly tending to support the findings, they must be sustained.

—Haarala v. Mickelson, 281.

23. Where the evidence is voluminous, it is not the duty of an appellate court to demonstrate, by a review of the evidence, the correctness of the findings of fact of the trial court. Rule applied in an action where the evidence filled some two thousand pages of the printed record.

—Wunder v. Turner, 16.

24. If the party defeated in the law suit has lost no property to which he is morally entitled, and the prevailing party has obtained no more than he, in justice, ought to have, the appellate court should long hesitate to disturb a verdict, approved by the trial court, on the sole ground that the evidence is not sufficient to support it.

—Lunschen v. Peterson, 292.

FINDINGS OF FACT OF TRIAL COURT.

See APPEAL AND ERROR, 21; TRUST, 7.

25. Findings of fact by a trial judge are entitled to the same weight as the verdict of a jury, and will not be reversed on appeal unless they are manifestly contrary to the evidence. Rule applied in an equity suit where the judge before whom the cause was tried was unable, by reason of illness, to finish the trial and it was argued and submitted to another judge upon the typewritten report of the evidence.

—Wunder v. Turner, 15.

26. The findings of a trial court are of equal weight with the verdict of a jury. They will not be set aside, unless manifestly and palpably against the weight of evidence, or if upon any reasonable theory of the evidence they can be sustained, or if under the evidence, different persons might arrive at different conclusions.

—Wann v. Northwestern Trust Co. 493, 497, 498.

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APPEAL AND ERROR—Continued.

VERDICT.

See APPEAL AND ERROR, 24.

27. Action for personal injury. Verdict of $500. *Held:* The damages are not so excessive that this court is warranted in interfering with the verdict, after it has met the approval of the trial court.
—Pylaczinski v. Great Northern Railway Co. 77.

FORMER DECISION LAW OF THE CASE.

28. The former decision upon an appeal from an order denying a motion for judgment notwithstanding the verdict, or for a new trial, is the law of the case upon an appeal on the same record from a judgment entered since the former appeal.
—O'Connor v. Great Northern Railway Co. 360.

APPEARANCE.

1. An appearance by way of motion to set aside a judgment rendered upon an unauthorized and void service of the summons, being specifically limited to the purposes of the motion, *held* a special appearance, though the motion also challenged the jurisdiction of the court upon the subject-matter of the action.
—Spencer v. Court of Honor, 422.

2. An appearance for special purposes *before judgment*, coupled with a demand for relief inconsistent with a claim of want of jurisdiction, is a general appearance, and a waiver of defects in the service of the summons. But where the appearance is made *after judgment*, and for want of proper service of process the judgment is void, a different rule applies.
—Spencer v. Court of Honor, 426.

ASSAULT AND BATTERY. See DAMAGES, 1.

ASSESSMENT FOR LOCAL IMPROVEMENT. See DRAIN, 2; MUNICIPAL CORPORATION, 5; TAXATION, 5–9.

ASSIGNMENT. See BANKRUPTCY, 2, 3; LOGS AND LOGGING, 3; MORTGAGE, 6–8; SPECIFIC PERFORMANCE, 2.

A time check, issued by a contractor, or his foreman, to a laborer, containing a memorandum of the time of labor and the amount he is entitled to receive therefor, is the evidence and symbol of his claim for such labor. The indorsement in blank of such a check and a delivery thereof is an assignment in writing of the claim for labor, as required by the statute.
—Small v. Smith, 119.

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ASSUMPTION OF RISK. See MASTER AND SERVANT, 18, 19, 20; PLEADING, 6.

AUTOMOBILE. See ESTOPPEL, 2; MASTER AND SERVANT, 37, 38; STREET RAILWAY, 7.

AWARD. See INSURANCE, 13.

BAILMENT. See MASTER AND SERVANT, 37.

Where, in an action by the bailor against the bailee upon an ordinary contract of nongratuitous bailment, the defendant admitted the receipt of the property and his inability to return it, a prima facie breach of the contract was thereby established, to meet which it devolved upon the defendant to prove that he exercised ordinary care in keeping the property.

—Travelers Indemnity Co. v. Fawkes, 353.

BANK. See MUNICIPAL CORPORATION, 2.

BANKRUPTCY.

1. The recording or registering of a transfer will not be deemed to be "required," within the bankruptcy act of 1898, c. 541, § 60, subds. a, b, as amended, unless, under the state law, the same is essential to validate the transfer against the creditors represented by the trustee of the bankrupt.

—Telford v. Henrickson, 431.

2. R. L. 1905, § 3502, providing that "every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration," is not a recording act. It provides a mere rule of evidence. It does not "require" a "recording" or registering within the meaning of the bankruptcy act of 1898, § 60, subds. a, b. Hence, where a written assignment of a claim was actually made more than four months prior to the filing of a petition in bankruptcy by the assignor, it could not be avoided by the trustee in bankruptcy as being a preference under section 60, subds. a, b, though it was never filed.

—Telford v. Henrickson, 427, 432.

3. A finding that an assignment was "not given in good faith" was construed, in view of the pleadings and its connection in the findings, as not a finding of actual fraud, but as referring to the fact that the assignee had notice of the assignor's insolvency, as bearing on the question of a preference.

—Telford v. Henrickson, 431.

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BILL OF LADING. See CARRIER, 8.

BOND. See PRINCIPAL AND SURETY; VENDOR AND PURCHASER, 6, 7.

BOOKS OF ACCOUNT. See EVIDENCE, 9, 10.

BREACH OF CONTRACT. See INSURANCE, 2; VENDOR AND PURCHASER, 9.

BREACH OF PROMISE.

1. The previous unchaste life of one of the contracting parties may be a valid defense in an action for breach of promise to marry, but in order to be a defense it must be pleaded as such.
—Cox v. Edwards, 519.
2. Where the promise is denied, and no matter is pleaded in avoidance or defense by reason of the previous impure life of plaintiff, the court correctly instructed the jury that, if such impure life did in fact exist, it was no defense, and could be considered by the jury only as bearing on the credibility of plaintiff's testimony and in mitigation of damages.
—Cox v. Edwards, 513.
3. In this action, the making of the promise, and, if made, whether the release pleaded as a defense was obtained by fraud or duress, *held* proper issues for jury.
—Cox v. Edwards, 512.
4. In actions for breach of promise and like cases, where a formal release executed by plaintiff is set up as a defense and plaintiff seeks to avoid its legal effect on the ground that it was procured by fraud or duress, the burden is undoubtedly on plaintiff to prove the fraud, for the presumption is in aid of the writing on that score.
—Cox v. Edwards, 515.

BROKER. See INSURANCE, 4; TRIAL, 5.

BURDEN OF PROOF. See APPEAL AND ERROR, 15; BREACH OF PROMISE, 4; CARRIER, 13; TROVER AND CONVERSION, 2.

CANCELATION OF INSTRUMENT. See VENUE, 4.

1. In an action to cancel a deed for fraud and for other relief, the trial court did not err in submitting specific questions of fact to the jury, R. L. 1905, § 4164.
—Green v. Hayes, 201.

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CANCELATION OF INSTRUMENT—Continued.

2. The finding of the jury that defendant agreed to return all of plaintiff's papers was equivalent to a finding that he agreed to reconvey the land to plaintiff.

—Green v. Hayes, 201.

CARMACK AMENDMENT. See CARRIER, 3, 4.

CARRIER.

TRANSPORTATION OF GOODS.

LIMITATION OF LIABILITY.

1. A carrier, by a fair, open, just and reasonable agreement may limit the amount recoverable by a shipper in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.

—O'Connor v. Great Northern Railway Co. 361.

2. Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. ed. —, and subsequent cases hold that, when such a contract is made out, its enforceability is determined not by the local law but by Federal law. A provision of a state constitution or statute making such contracts void, or a decision of a state court that they are against public policy, is not controlling.

—O'Connor v. Great Northern Railway Co. 361.

3. The Carmack amendment of the Hepburn act (Act June 29, 1906, 34 St. 595 [U. S. Comp. St. Supp. 1911, p. 1307]) does not prevent a common carrier from making valid shipping contracts limiting liability according to an agreed value upon interstate shipments under legal tariff rates.

—Carpenter v. United States Express Co. 60.

4. It seems to us the evident aim of the Carmack amendment was to impose on the initial carrier, who accepts a shipment which must necessarily pass to other carriers, the burden of being the principal, making it responsible for the conduct of the connecting carriers who are its agents, and that is the extent of the duty imposed by the act. This burden the initial carrier cannot escape by any contract stipulation.

—Carpenter v. United States Express Co. 65.

5. Upon the facts herein plaintiff is not in a position to raise the question whether a contract of interstate carriage should be construed in accordance with the laws of the state where the breach occurred, rather than in accordance with the laws of the state where made.

—Carpenter v. United States Express Co. 59.

6. Plaintiff, by an agent, gave to defendant, an express company, valuable

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CARRIER—Continued.

furs in wrapped packages for shipment from New York to Minneapolis, and accepted a shipping receipt therefor wherein it was stipulated that in case of loss the value did not exceed $50. Adhering to the rule in Porteous v. Adams Express Co., 115 Minn. 281, 132 N. W. 296, the shipping receipt became, under the decisions of New York, a valid contract in all its terms.

—Carpenter v. United States Express Co. 59.

7. The finding to the effect that defendant had legal rates graduated in accordance with the value of the shipment, so that it was lower when the value of the shipment was limited to $50 or less, and correspondingly higher when valued in excess of said sum, is sustained by the evidence, so that no special consideration need be shown for the limited liability, other than the lower rates in force for shipments made thereunder.

—Carpenter v. United States Express Co. 60.

VENDOR'S LIEN.

8. Where goods are shipped by carrier, the consignee is presumed to be the owner. A direction in the bill of lading to "notify" a third party does not make such party the consignee, nor does it give rise to any presumption that he is the owner, even if a draft be made on him with the bill of lading attached, and the same are forwarded together with instructions to make delivery upon payment of the draft. But the presumption of ownership in the consignee may be rebutted by proof of a completed sale to the party to be notified before the shipment. In such case, if the price is not paid, the vendor holds a vendor's lien until payment or delivery. If he consigns the goods to himself, the effect is to simply preserve such vendor's lien.

—Ammon v. Illinois Central Railroad Co. 438, 440.

EVIDENCE.

9. *Held*, that the findings that the shipping receipt is a contract entered into fairly, and is just and reasonable, is supported by the evidence.

—Carpenter v. United States Express Co. 59.

10. Evidence that goods are loaded in good condition, that their character was such that if properly handled they would have gone without damage to their destination, and that they in fact arrived there in damaged condition, is presumptive evidence of negligence. The evidence on the part of defendant in this case does not overcome such presumptive showing.

—Ammon v. Illinois Central Railroad Co. 438.

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CARRIER—Continued.

11. Plaintiff's evidence showed that a shipment of strawberries was inspected at point of shipment by an association inspector. The shipper testified that he also inspected them, and that they were loaded in good condition and perfectly sound, though he personally inspected but one or two cases in each wagon load. Another witness testified to the general good condition of berries at point of shipment at that time; another that the damaged condition in which they arrived was due to heat. Defendant's witness testified solely from records that the car was kept properly iced. *Held*, the evidence sustained a finding that the damaged condition in which they arrived was due to negligent transportation.
—B. Presley Co. v. Illinois Central Railroad Co. 295.

12. Evidence as to the customary time for unloading a car of damaged berries *held* not error.
—B. Presley Co. v. Illinois Central Railroad Co. 295.

13. The burden of proof is on the defendant to show that plaintiff failed to present its claim within the time provided by the bill of lading. *Held* that, as a matter of law, the proof in this case was not sufficient to sustain a finding that a claim was not so made.
—B. Presley Co. v. Illinois Central Railroad Co. 295.

14. Shipment of a car of potatoes by plaintiff to himself at Kansas City, with instructions to notify the company there on which plaintiff drew his draft for the price of the potatoes. *Held:* The shipment imposed upon defendant the duty to inform plaintiff of the refusal of a prospective purchaser to accept the same within 48 hours. The evidence justified the conclusion that the purchaser refused to accept the consignment, and that defendant negligently failed to notify plaintiff thereof.
—Emerson v. Chicago, Burlington & Quincy Railroad Co. 84.

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—Janochosky v. Kurr, 471, 476.

CASES (MINNESOTA) LIMITED.

Chauncey v. Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826.
—Foster v. City of Duluth, 486, 487, 488.

Lockway v. Modern Woodmen, 116 Minn. 115, 133 N. W. 398.
—Spencer v. Court of Honor, 425.

Patterson v. Adan, 119 Minn. 308, 138 N. W. 281.
—Butler Brothers v. American Fidelity Co. 164.

CHANGE OF VENUE. See CORPORATION, 8, 9; VENUE, 5, 6.

CHARGE TO JURY. See APPEAL AND ERROR, 4, 11, 12, 14–16; BREACH OF PROMISE, 2; CRIMINAL LAW, 6; INSURANCE, 5; MASTER AND SERVANT, 27; STREET RAILWAY, 12; TRIAL, 6–8; TROVER AND CONVERSION, 2.

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CHARITY. See TAXATION, 3.

A gift of a bond to an individual trustee, in trust to pay the income thereof, or, in case of its payment or sale, to pay the income of the investment of the proceeds, "to and for the benefit of the Young Men's Christian Association of the city of Minneapolis, a corporation of the state of Minnesota, the same to be received and used by said corporation * * * in carrying out its purposes of providing boys and young men, members of the association, with education along industrial lines," *held* not invalid for indefiniteness in the designation of the beneficiary; the corporation being the beneficiary, notwithstanding that it was to receive the profits of the trust upon a condition as to its use.

—Young Men's Christian Association of Minneapolis v. Horn, 404.

CIRCUMSTANTIAL EVIDENCE. See MORTGAGE, 3.

CLASS LEGISLATION. See CONSTITUTION, 1.

COLLATERAL ATTACK. See DRAIN, 3; REGISTRATION OF TITLE, 5, 6.

COMPLAINT. See APPEAL AND ERROR, 5; CORPORATION, 5; LIMITATION OF ACTION, 1; MASTER AND SERVANT, 5, 7, 23; PARTIES TO ACTION, 2; PLEADING, 3, 4, 6; TROVER AND CONVERSION, 1; VENUE, 3.

CONCURRENT CAUSE. See MASTER AND SERVANT, 2, 23.

CONSTITUTION.

1. Laws 1907, p. 478, c. 345, § 19 [R. L. Supp. 1909, § 1704–29] is not unconstitutional, as class legislation, because a foreign fraternal beneficiary association is given 30 days in which to answer, when all other corporations are allowed but 20 days.

—Spencer v. Court of Honor, 422.

2. Where, upon a petition, filed under the proviso of Laws 1907, p. 212, c. 188 [R. L. Supp. 1909, § 1286], for the enlargement of a school district, the county board, in rearranging the districts affected by the change, included in one of the districts land situated in another, under the belief that the same already belonged to the former, such land, furthermore, not being mentioned in either the petition or the notice of hearing, and there being no appearance at the hearing in behalf of the district to which the land belonged, the action of the district court, on appeal from the order of the board, in modifying such order by omitting therefrom the land thus erroneously included therein, did not constitute an excess of jurisdiction, as being a usurpation of legislative power or

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CONSTITUTION—Continued.

otherwise; the action of the board with reference to such land being a mere nullity.

—Oppegaard v. Board of Commissioners of Renville County, 443.

CONSUL. See AMBASSADOR AND CONSUL, 2–7.

CONTRACT. SEE COURTS (MUNICIPAL) 2; EVIDENCE, 6; FRAUDS (STATUTE OF) 1; INSURANCE, 1, 3; INSURANCE (INDEMNITY) 7; MECHANIC'S LIEN, 1, 2; MUNICIPAL CORPORATION, 1, 2; SPECIFIC PERFORMANCE, 2–4; VENDOR AND PURCHASER.

CONSTRUCTION OF BUILDING CONTRACT.

1. Where F., doing business as a building company, contracted with the defendant to furnish certain material and labor for a building, the price thereof to be applied upon a debt due from F. to a firm of which the defendant was a member, and subsequently the building company was incorporated, and the corporation actually furnished such material and labor, but the defendant had no notice or knowledge of such facts, the defendant could not be held liable to the corporation, either for the material and labor so furnished, or for material and labor furnished pursuant to a similar contract executed subsequently to the plaintiff's incorporation, but likewise without notice to or knowledge by the defendant that he was not still dealing with F., or for extras furnished by the plaintiff under the same circumstances.

—Fitzpatrick Building Co. v. Healy, 237.

QUESTION FOR JURY.

2. The question of the making of the agreement between the defendant and F., and the question as to whether the defendant had notice or knowledge of the matters subsequently occurring, or of the fact that the material and labor was actually furnished by the plaintiff, *held*, under the evidence, for the jury.

—Fitzpatrick Building Co. v. Healy, 237.

ENFORCEMENT OF FOREIGN CONTRACT.

3. A contract, valid in the state where made, will be enforced by the courts of this state, when not contravening the public policy of the state, or its laws.

—Carpenter v. United States Express Co. 59, 62.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 20–22; RAILWAY, 2, 5–7; STREET RAILWAY, 7.

CORPORATION. See APPEAL AND ERROR, 3; CONTRACT, 1.

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CORPORATION—Continued.

ISSUE OF STOCK.

1. A corporation may in good faith issue paid up shares for the purchase of property or for services actually rendered, unless prohibited by constitutional or statutory provisions. But when the stock is not paid for in full, either in money, property, or services, equity will inquire into the actual transaction, including the value of the property or services received as payment. In this case the stock issued to appellants in return for their services as directors, and purporting to be fully paid, was in fact bonus stock, and not paid for by any services rendered.
—Randall Printing Co. v. Sanitas Mineral Water Co. 269, 273.

2. It is not necessary that a certificate for stock in a corporation to which a person is entitled be issued to constitute one a stockholder therein. The certificate is merely evidence of his title to the stock.
—Randall Printing Co. v. Sanitas Mineral Water Co. 275.

ACTION BY CREDITOR TO RECOVER UNPAID STOCK SUBSCRIPTIONS.

3. The right of creditors to recover of stockholders in a corporation unpaid stock subscriptions does not depend upon constitutional or statutory provisions imposing a liability of stockholders to the corporation, but is based upon fraud. The remedy is governed by the law of the forum, and there is no distinction between domestic and foreign corporations in respect to such right of creditors to recover.
—Randall Printing Co. v. Sanitas Mineral Water Co. 268.

4. When a creditor proves the issuance of stock to a stockholder, and that he subsequently trusted the corporation, it is presumed that he relied upon the subscription, and the representation that the stock was fully paid. The evidence in this case did not show that plaintiffs did not rely upon such subscription and representation when they extended credit to the corporation.
—Randall Printing Co. v. Sanitas Mineral Water Co. 269.

5. If the complaint in the nature of a creditor's bill under R. L. 1905, § 3173, to reach unpaid subscriptions of stock by resident stockholders of a foreign corporation was deficient, it was because the action was not brought in behalf of all the creditors. It was in the nature of a defect of parties plaintiff or defendant. This defect was waived by failing to object either by demurrer or answer.
—Randall Printing Co. v. Sanitas Mineral Water Co. 272.

6. There was no error in the admission of evidence, and it sustains the decision that appellants were stockholders of the corporation at the time the indebtedness to plaintiffs was incurred.
—Randall Printing Co. v. Sanitas Mineral Water Co. 269.

BREACH OF CONTRACT FOR SALE OF STOCK.

7. Action for specific performance of an agreement to buy certain shares of

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CORPORATION—Continued.

stock, or, if performance be not decreed, then for the price. *Held:* As against a demurrer the allegations of the complaint outlined in the opinion stated facts showing the breach of a valid executory contract for the sale and purchase of the stock.

—First National Bank of Hastings v. Corporation Securities Co. 105.

ACTION AGAINST CORPORATION—PLACE OF TRIAL.

8. The words "residence" and "home" are not, as ordinarily used, synonymous; but when used in an affidavit for change of venue, with reference to a corporation and its general office, the word "home" is the equivalent of "residence." The affidavit herein for the change of the place of trial was sufficient. The change of the place of trial was not waived.

—State ex rel. v. District Court of Clay County, 100, 103.

9. The original articles of incorporation named B. as its principal place of business. The amended articles named M. in another county as its principal place of business. The certificate of the amended articles was not filed and recorded in the county in which B. was situated. *Held:* It appeared from the record that defendant's bona fide and de facto residence had been at M. ever since the amendment of the articles, and was its place of residence at the time of the commencement of the action against it.

—State ex rel. v. District Court of Clay County, 103.

ACTION AGAINST FOREIGN CORPORATION.

See INSURANCE (LIFE) 19.

10. An action in the nature of a creditor's bill under R. L. 1905, § 3173, to reach unpaid stock subscriptions by resident stockholders of a foreign corporation, may be maintained in this state. Conceding that an action under R. L. 1905, § 2865, will not lie to recover unpaid subscriptions to the stock in a foreign corporation, the complaint in this case was sufficient as a complaint under section 3173, save for a defect of parties plaintiff or defendant, and such defect, not having been objected to by demurrer or answer, was waived. The corporation was never authorized to do business in Minnesota.

—Randall Printing Co. v. Sanitas Mineral Water Co. 268, 272.

COSTS. See APPEAL AND ERROR, 13.

COUNTY ATTORNEY. See ESTOPPEL, 1.

COURTS (DISTRICT). See PERPETUITY, 2; SCHOOL DISTRICT, 2; TRIAL, 11; TRUST, 3.

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COURTS (MUNICIPAL).

JURISDICTION.

1. In an action in the municipal court of St. Paul, jurisdiction of the person cannot be acquired by service of the summons outside of Ramsey county.
—Juster v. Court of Honor, 325.
2. Where the complaint, in an action on contract in the municipal court of St. Paul, claims $500 with interest, the court is without jurisdiction of the subject-matter.
—Juster v. Court of Honor, 325.
3. Shatto v. Latham, 33 Minn. 36, 21 N. W. 838, established that, without some authority to the contrary, either express or fairly implied, service of process from municipal courts must be made within the county.
—Juster v. Court of Honor, 328.

COVENANT. See VENDOR AND PURCHASER, 3.

CREDITOR. See EXECUTOR AND ADMINISTRATOR, 1-3.

CRIMINAL LAW.

RAPE.

1. In a prosecution for rape upon a female child under the age of consent, the evidence is *held* to support the verdict of guilty.
—State v. Schueller, 26.
2. The county attorney, in his opening address to the jury, said the state expected to show several acts of intercourse with complainant, and defendant moved for an order requiring the state to elect, if there was more than one act on which reliance would be placed for conviction. The indictment charged but one offense. There was no claim of an alibi. *Held:* The trial court did not err in denying the motion. The motion was addressed to the sound discretion of the court.
—State v. Schueller, 28.
3. Evidence of acts of intercourse between the parties immediately prior to the time relied upon by the state for conviction, and other than the act so relied upon, *held* competent and proper, as tending to corroborate the charge made by complainant.
—State v. Schueller, 26.
4. Evidence of this character should be confined to reasonable limits as to time, and be not of acts or conduct so remote as to render its corroborative force doubtful and uncertain. To what extent the state may go in this direction must rest in the sound discretion of the trial court.
—State v. Schueller, 30.

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CRIMINAL LAW—Continued.

5. Whether evidence of subsequent acts is admissible for the same purpose, quære. But the admission thereof, under the circumstances stated in the opinion, *held* not prejudicial to defendant.
—State v. Schueller, 26.

CHARGE TO JURY.

6. The trial court did not err in refusing a request to charge the jury, where the request incorrectly stated the rule it attempted to give. The court was not required to correct the request and make its language conform to the rule.
—State v. Schueller, 31.

DAMAGES. See APPEAL AND ERROR, 27; MUNICIPAL CORPORATION, 9; VENDOR AND PURCHASER, 9, 10.

1. Verdict of $500 in an action for assault and battery. *Held:* The damages seem large, considering the character of the injuries complained of, but since the trial court approved the verdict, this court does not see its way clear to interfere.
—Evenstad v. Stevens, 532.

IN ACTIONS FOR PERSONAL INJURY OR DEATH.

2. Action for wrongful death. Evidence that decedent was unmarried, lived with his parents, rendered services and contributed $100 per annum to his parents. *Held:* A verdict for $3,250 was not excessive, after its approval by the trial court.
—Tegels v. Great Northern Railway Co. 35, 36.

3. Action for personal injury to a child seven years old. Her left thigh bone was fractured, resulting in a permanent shortening of the leg, causing a slight limp in her walk, some curvature of the spine, with a detrimental effect on the general health. *Held:* The damages are not excessive.
—Pickell v. St. Paul City Railway Co. 341, 346.

4. Verdict of $4,158 *held* not excessive for a broken leg near the hip where a permanent shortening of 1¼ inches, deformity of the bone, and wasting of the muscles of the leg resulted. Besides it appeared that in wages, hospital, and medical attendance plaintiff had lost or paid $750, and that he had suffered severe pains which he was not free from at the trial, more than a year after the injury.
—Peaslee v. Railway Transfer Co. 347, 353.

5. Action for personal injury. Verdict for $1,200. *Held:* The amount was not so excessive as to warrant interference.
—Geiss v. Twin City Taxicab Co. 373.

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DAMAGES—Continued.

6. Verdict for $2,000 in an action for personal injury. Plaintiff was a farmer and lectured at farmers' institutes. If the testimony was true that he was suffering from traumatic neurosis and, under ordinary treatment, would recover in two years from the time of the accident, the damages were not excessive. The question was one of fact for the jury and their verdict was sustained.
—McLaren v. Great Northern Railway Co. 531.

DEATH BY WRONGFUL ACT. See APPEAL AND ERROR, 11; DAMAGES, 2; EVIDENCE, 4; EXECUTOR AND ADMINISTRATOR, 2; MASTER AND SERVANT, 28; RAILWAY, 4.

DECEIT. See FRAUD, 2.

DEED. See MORTGAGE, 1–5; VENDOR AND PURCHASER, 1, 4, 8.
The surrender of a deed which had been delivered, but not recorded, would not revest the title to the land in the grantor.
—Green v. Hayes, 201.

DEFECT OF PARTIES. See PARTIES TO ACTION, 1; PLEADING, 5.

DEMURRER. See LIMITATION OF ACTION, 1, 4; PLEADING, 2, 4, 6.

DISCRETION OF TRIAL COURT. See APPEAL AND ERROR, 13; CRIMINAL LAW, 2, 4; JUDGMENT, 2, 3; MASTER AND SERVANT, 3; NEW TRIAL, 4, 5; PLEADING, 7; TRIAL, 5; WITNESS, 4.

DISMISSAL. See APPEAL AND ERROR, 6.

DITCH. See DRAIN.

DIVORCE. See PLEADING, 3.

CONDONATION.

1. Continued cohabitation after the commission of a matrimonial offense, with knowledge of the offense, constitutes condonation, and will ordinarily bar an action for divorce by the innocent party. But to operate as such it should appear that the subsequent cohabitation was entirely voluntary, free from restraint, and that thereafter the offending spouse treated the innocent party with conjugal kindness.
—Mandelin v. Mandelin, 199.

2. The law of condonation rests (1) upon the express or implied forgiveness by the injured party; and (2) the express or implied promise of

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DIVORCE—Continued.

proper treatment by the other. If the improper or cruel treatment continues there is no condonation.

—Mandelin v. Mandelin, 199.

SERVICE OF SUMMONS.

3. A return on a summons in a divorce suit showed valid service. A finding that the person who made the return handed a copy of the summons and complaint, inclosed in a sealed and unaddressed envelop, to the defendant, stating that he had been directed by defendant's husband to give the same to her, coupled with a finding that on the same day the defendant ascertained the contents of the summons and complaint, does not show a defective service.

—McElrath v. McElrath, 380.

EVIDENCE OF CRUELTY.

4. In an action for divorce on the ground of cruel and inhuman treatment, the evidence is *held* to support the findings of the trial court that the allegations of the complaint were true, and to negative the defense of condonation.

—Mandelin v. Mandelin, 198.

ACTION TO SET ASIDE.

5. In an action to vacate a decree of divorce on the ground that it was obtained by fraud and perjury of the prevailing party, brought after the death of the party guilty of the fraud, the state is no longer a party interested, and the action becomes one involving mere property rights, governed by the ordinary equitable principles.

—McElrath v. McElrath, 380.

6. In such an action, where the fraud and perjury charged against the prevailing party does not involve the jurisdiction of the court, nor any fraud or deception by which the opposing party was misled or prevented from making a defense, but relates solely to perjury and concealment in establishing the cause of action alleged, it does not come within the purview of R. L. 1905, § 4277.

—McElrath v. McElrath, 380.

7. A defendant, upon whom the summons and complaint in a divorce suit was personally served, delayed for 14 years after such service, and more than 9 years after knowledge that a decree had been entered, to apply to the court to have it vacated, but waited till after the death of the plaintiff therein. *Held*, that her long delay was not excused, either by her ill health or the alleged ignorance of the fraud and perjury practiced by the prevailing party.

—McElrath v. McElrath, 381.

8. When the spouse wronged by the decree, or anyone claiming under such an

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DIVORCE—Continued.

one, comes into court asking relief, so that property may be reached, it must be done within a reasonable time after knowledge of the fraud, or of facts from which a person of ordinary prudence would proceed to ascertain the true state of affairs.

—McElrath v. McElrath, 386.

DRAIN.

AMENDED FINDINGS.

1. The amended findings directing judgment for the amount of the ditch assessment *held* sustained by the evidence.

—State v. Lindberg, 148.

INSUFFICIENT JUDGMENT.

2. A landowner, whose land had been assessed for benefits from the construction of a drainage ditch, failed to pay the assessment, and the amount thereof was entered upon the delinquent tax list for collection as required by the drainage statute. He appeared in that proceeding and interposed in defense the invalidity of the ditch proceedings. The court sustained the defense and directed the entry of judgment discharging the land from the assessment. The clerk of the court, upon the same paper and at the end of the findings and order of the court, made the entry, "Judgment is hereby entered in accordance with the foregoing." No formal judgment was entered.

It is *held:* (1) That this entry did not constitute a valid judgment within the requirements of the statutes upon the subject of judgments in delinquent tax proceedings; and (2) that it did not preclude the right of the court, after the expiration of the time for appeal from judgments properly entered, from entertaining and granting an application for amended findings.

—State v. Lindberg, 147.

COLLATERAL ATTACK.

3. The rule that parties to ditch proceedings cannot, after completion of the proceedings and the construction of the ditch, be heard to attack the validity of the proceedings in a collateral action, followed and applied.

—State v. Lindberg, 147.

DURESS. See APPEAL AND ERROR, 15, 16; WORDS AND PHRASES, 2.

EASEMENT. See REGISTRATION OF TITLE, 6.

A deed of real estate construed, and *held* to convey to the grantee an easement of a passageway over the land of the grantor, and that such ease-

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EASEMENT—Continued.

ment was permanent, and not limited to the life of the building on the premises.

—Riley v. Pearson, 210.

EJECTMENT. See TRIAL, 7.

Action of ejectment to recover possession of land of which, the complaint alleged, the plaintiff's intestate died seised. The answer alleged title in one of the defendants, under whom the others claimed, by adverse possession. Evidence as to such adverse possession considered, and *held*, that the finding of the trial court to the effect that the intestate died seised of the land is not sustained by the evidence.

—Gaston v. May, 154.

EQUITY. See CORPORATION, 1; MORTGAGE, 5.

1. An action to determine adverse claims may be either legal or equitable, according to the facts and the relief sought; and hence, where the plaintiff sought to have a deed and contract of sale declared to constitute a mortgage, and to have the same adjudged inoperative because of violation of the mortgage tax law, the action was of equitable cognizance, and as such was subject in its determination to the rules that equity will not enforce a forfeiture or grant relief to one who has neither done equity in the premises nor indicated his willingness to do it.

—Mason v. Fichner, 186.

2. Equity will not aid a litigant to enforce a forfeiture because of a violation of a revenue law.

—Mason v. Fichner, 193.

ESTOPPEL.

1. An admission by the county attorney, express or implied, of the validity of a judgment attempted to be entered by the clerk, *held* not to estop the state or the county.

—State v. Lindberg, 148, 153.

2. Where the defendant in an action for injury to an automobile had acted virtually as appraiser between the plaintiff, an insurance company, and the owner of the machine, and the plaintiff had paid the owner the amount of the loss fixed by such appraisement, the defendant was estopped to introduce evidence as to the value of the machine.

—Travelers Indemnity Co. v. Fawkes, 354.

EVIDENCE. See APPEAL AND ERROR, 8, 9, 21–26; BANKRUPTCY, 2; CARRIER, 8, 10–13; CRIMINAL LAW, 3, 4, 5; INSURANCE (INDEMNITY) 10, 12; MORTGAGE, 2–4; NEW TRIAL, 3–6; PARTIES TO ACTION, 1; PROCESS; TRIAL, 3; TRUST, 9, 11.

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EVIDENCE—Continued.

CIRCUMSTANTIAL EVIDENCE.

See MORTGAGE, 3.

JUDICIAL NOTICE.

1. The court will take judicial notice of the contents of a home rule charter, and of amendments regularly adopted thereto, certified and deposited as required by law.
—A. A. White Townsite Co. v. City of Moorhead, 2, 5.

2. We may take notice that the purchasing power of money is now the reverse of great.
—Peaslee v. Railway Transfer Co. 352.

DECISIONS OF FOREIGN STATE.

3. Where the common or decision law of a foreign state is in issue, decisions of the court of last resort in that state which were not received or offered in evidence at the trial cannot be considered in this court for any purpose.
—Walson v. McGregor, 236.

FAILURE TO CALL WITNESS.

4. In an action for the death of a pedestrian at a railway crossing, the jury had the right to consider the defendant's failure to produce as a witness the fireman of the engine which struck the deceased, in determining the truth of the engineer's testimony that he signaled by whistle and that the fireman rang the bell.
—Tegels v. Great Northern Railway Co. 32, 34.

SUPPRESSION OF EVIDENCE.

5. Action for failure to fulfil agreement to obtain fire insurance upon a certain building upon which an insurance rating had not been placed. *Held:* The jury had the right to consider defendant's failure to produce the writings claimed to have been received by him concerning the rating.
—Russell v. O'Connor, 73.

RELEVANCY TO ISSUE.

6. Where there was no direct evidence except that of the parties, as to whether a certain alleged contract with reference to an invention was made, and the testimony was radically conflicting, the court did not err in sustaining an objection to offered evidence of prior art patents by plaintiff. The scope or character of prior art patents has but little, if any, relevancy to the question whether the contract was made.
—Wunder v. Turner, 16.

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EVIDENCE—Continued.

RES GESTAE.

See STREET RAILWAY, 4.

7. Statements of bystanders, made in reply to a motorman's declaration immediately after a collision between his car and an automobile, which appeared to be, so far as admitted, simply a denial of his statement that he rang the bell, were admissible as spontaneous declarations tending to throw light on the accident and were not prejudicial to defendant.

—Hedlund v. Minneapolis Street Railway Co. 324.

HEARSAY.

8. Action for failure of defendant to fulfil agreement, made over the telephone with plaintiff's wife, to write fire insurance upon a certain "unrated" building. *Held:* Objections to the conversation between plaintiff and his wife, in which he authorized her to apply to defendant for insurance, as hearsay, were properly overruled.

—Russell v. O'Connor, 74.

DOCUMENTARY.

See STREET RAILWAY, 5; TRIAL, 4.

BOOK ENTRY—LOOSE LEAF LEDGER.

See WITNESS, 1–3.

9. Plaintiff's manager testified that a certain book entry was a record kept in plaintiff's office, made at the time of the transaction, from temporary sale slips that are not preserved, made by a clerk in the office in his presence, and that it was true and correct. *Held* sufficient, though he could not state what particular clerk made the entry.

—B. Presley Co. v. Illinois Central Railroad Co. 295.

10. Objection was made to receiving in evidence a sheet from plaintiff's loose-leaf ledger, on the ground that it was not shown to be an account book within the terms of R. L. 1905, § 4719. *Held:* The entry was properly received.

—B. Presley Co. v. Illinois Central Railroad Co. 297.

PAROL EVIDENCE—WRITINGS.

See TRIAL, 4.

11. The degree of proof required to lay the foundation for secondary or parol evidence of the contents of a written instrument depends on the circumstances of each case. Stricter proof is required where the instru-

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EVIDENCE—Continued.

ment is the foundation of the action or defense than where the instrument is only collaterally involved.

—Drew v. Carroll, 483.

OPINION EVIDENCE.

See PROCESS, 1.

12. The opinion of an expert of the value of a partly frozen car load of potatoes *held* properly admitted in evidence. The rule that the admission of such evidence is discretionary with the trial court followed and applied. McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118.

—Emerson v. Chicago, Burlington & Quincy Railroad Co. 84.

WEIGHT OF UNCONTRADICTED EVIDENCE.

13. The fact that the defendant's evidence, tending to show that he fulfilled his obligations under the contract, was uncontradicted by other evidence, did not require either the court or the jury to accept the defendant's contention in such regard as established, where such evidence was itself contradictory, and the defendant also failed to produce other evidence at his command to sustain his claim.

—Russell v. O'Connor, 67.

EXCHANGE OF PROPERTY.

1. In an action to cancel a deed for fraud and for other relief, the evidence was sufficient to sustain the findings that the exchange of property was induced by the fraud of defendant.

—Green v. Hayes, 201.

2. Whether the parties to the action made an agreement to rescind a previous agreement to exchange land for a livery stable business was a question of fact for the trial court.

—Green v. Hayes, 201.

3. Plaintiff conveyed land to defendant and gave his notes and chattel mortgage in exchange for the latter's livery stable business. Eight months after, the parties agreed that defendant should take back the stock and return plaintiff's notes and chattel mortgage. The deed had not been recorded. Plaintiff then brought an action to cancel the deed because of fraudulent representations and for other relief. *Held:* Under the determined facts, plaintiff was entitled to the remedy invoked.

—Green v. Hayes, 201.

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EXECUTOR AND ADMINISTRATOR. See AMBASSADOR AND CONSUL, 1-7.

RIGHT TO APPOINTMENT.

1. One holding a claim for funeral expenses is a "creditor," within R. L. 1905, § 3696, subd. 2, and may apply for administration pursuant to the provisions thereof.
   —Austro-Hungarian Consul v. Westphal, 123.
2. A creditor, whose claim is for funeral expenses of the deceased, may be appointed administrator of the estate of his deceased debtor, though the only assets consist of a cause of action for the wrongful death of the decedent.
   —Austro-Hungarian Consul v. Westphal, 123.
3. Under R. L. 1905, § 3696, subd. 2, the probate court has no power to grant letters of administration to any one except a creditor, or to some other person interested in the administration of the estate; a creditor having no authority under such subdivision to nominate a stranger.
   —Austro-Hungarian Consul v. Westphal, 124.
4. Under R. L. 1905, § 3696, subd. 3, construed in the light of its history, interest in the administration of the estate is not essential to eligibility to appointment as administrator after the lapse of four months from the death of the deceased without application by any person so interested.
   —Austro-Hungarian Consul v. Westphal, 124.
5. R. L. 1905, § 3696, in limiting the time within which the priorities of right of administration thereby conferred must be asserted, uses the word "neglect" synonymously with "fail."
   —Austro-Hungarian Consul v. Westphal, 123.

QUALIFICATION OF EXECUTOR.

6. We think it clear that one interested in an estate has the right to have its representative wholly free from conflicting personal interests, so that, when the question arises as to the necessity or propriety of a judicial investigation concerning the existence of uninventoried assets, such question may be determined in the first instance by one entirely free from adverse interests or partiality.
   —Corey v. Corey, 310.

REMOVAL OF EXECUTOR.

7. Upon a petition by a widow, who had renounced her husband's will, to remove the executor named by the will, on the ground of his personal interest in certain transfers made by the testator in his lifetime and alleged by the petitioner to be invalid, *held*, under the facts, that the

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EXECUTOR AND ADMINISTRATOR—Continued.

establishment of the invalidity of such transfers was not essential to the granting of the relief sought.

—Corey v. Corey, 304.

8. The fact that the petitioner was the only person who would be benefited by a restoration of the property so transferred *held* not to bar her right to have the matter passed upon by an impartial representative in the first instance, and to have such a person in charge of the estate so long as such matter is in controversy.

—Corey v. Corey, 305.

CLAIM FOR SERVICES RENDERED BY PERSON IN FAMILY.

9. A finding that a claimant for the value of services rendered to the intestate, her brother, was received and remained as a member of his family, without any agreement that her services were to be compensated, was sustained by the evidence.

—Maycroft v. Maycroft, 529.

EXEMPTION. See TAXATION, 2.

FACTOR.

SALE ON COMMISSION.

Plaintiff consigned horses to defendant for sale on commission. Defendant sold the horses, and plaintiff brought this action, claiming that he instructed defendant not to sell at less than a stated price, which was larger than that received on the sale made, and seeking to recover damages. It is *held* that the decision of the trial court to the effect that no instructions as to price were given, and that the sale was made at the best price obtainable on the market, is sustained by the evidence.

—Hoven v. Charles H. Haas Commission Co. 509.

FELLOW SERVANT. See MASTER AND SERVANT, 12–16; RAILWAY, 1.

FENCE. See ADVERSE POSSESSION, 2; RAILWAY, 9.

FINDINGS. See APPEAL AND ERROR, 1, 2, 25, 26; DRAIN, 2; TRIAL, 9, 11.

FIRE. See MUNICIPAL CORPORATION, 6; RAILWAY, 10, 11.

FOREIGN DECEDENT. See AMBASSADOR AND CONSUL, 1–7.

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FOREIGN CORPORATION. See CORPORATION, 10; INSURANCE (LIFE) 19; JUDGMENT, 6.

FORFEITURE. See EQUITY, 2; INSURANCE (LIFE), 20, 22, 23.

FORMER DECISION. See APPEAL AND ERROR, 28.

FRAUD. See APPEAL AND ERROR, 15; BANKRUPTCY, 3; BREACH OF PROMISE, 3, 4; CANCELATION OF INSTRUMENT, 1; DIVORCE, 5, 6, 8; MORTGAGE, 8; RELEASE; TRUST, 6, 9; VENUE, 4.

1. In order to sustain an action for fraud, it must appear that defendant has made a false representation of a material fact, susceptible of knowledge, knowing it to be false, or as of knowledge where he does not know whether it is true or false, with intent to induce plaintiff to rely upon it, and that plaintiff has relied on it, and is deceived, to his damage.
—Wann v. Northwestern Trust Co. 493, 498.

PLEADING.

2. In an action for deceit the allegation that defendant, by means of the fraud set out in the complaint, obtained from and converted a certain sum of plaintiff's money, is a sufficient allegation of damages, as against a demurrer.
—Berry v. Kolb, 522.

FRAUDS, (STATUTE OF).

CONTRACT TO SELL LAND.

1. A contract for the sale of land cannot rest partly in writing and partly in parol.
—Wilson v. Hoy, 453.

PART PERFORMANCE.

2. *Held*, following Williams v. Stewart, 25 Minn. 516, that where a person holding a valuable right refrains from exercising the same, in reliance upon an oral agreement of another to convey, until such right expires, it constitutes sufficient part performance to take the agreement out of the statute of frauds.
—Janochosky v. Kurr, 471.

HEARSAY. See EVIDENCE, 8.

HIGHWAY.

In an action to enjoin the laying out or working a highway over the land of plaintiffs, a finding that a road at the place in question had not been

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HIGHWAY—Continued.
used or worked for six years continuously as a public highway, and there was no public road at the place, was sustained by the evidence.
—Orth v. Township of Norfolk, 530.

HOME RULE CHARTER. See MUNICIPAL CORPORATION, 3.

HOMESTEAD. See PUBLIC LAND, 1–5.

HUSBAND AND WIFE.
The purpose of an antenuptial contract was to reserve to each party his property and property rights, precisely as though no marriage took place between them, and each thereby reserved the right to sell and dispose of his or her separate property free from any claims on the part of the other.
—Wellendorf v. Wellendorf, 438.

ICE AND SNOW. See MUNICIPAL CORPORATION, 11.

INJUNCTION. See APPEAL AND ERROR, 1.

INSURANCE.

AGREEMENT TO OBTAIN INSURANCE.

1. Instruction given by a property owner to an insurance agent to "write out a thousand dollars insurance" on a certain building, and the agent's acceptance thereof by saying that he would "attend to that right away," *held*, under the facts of the case and in view of the prior course of dealing between the parties, to create a contract whereby the agent undertook to use reasonable diligence to procure the insurance and seasonably to notify the plaintiff in the event of the failure of such attempt, though, by reason of the fact that the building was a "special hazard," the agent had no authority to write the insurance at the time of the conversation.
—Russell v. O'Connor, 66.
2. Evidence in an action for the breach of such contract considered, and *held* sufficient to take the case to the jury upon the question as to whether the defendant fulfilled the obligations imposed upon him by the said agreement.
—Russell v. O'Connor, 67.
3. The defendant's claim that no contract resulted, based on the contention that the failure to agree upon the premium prevented a meeting of

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INSURANCE—Continued.

minds sufficient to contract, is untenable. The relation between the parties arising from the conversation created an implied obligation on plaintiff's part to pay the premium, if the policy had been written.
—Russell v. O'Connor, 69, 70.

4. That relation constituted defendant an insurance broker, and as such he undertook to use reasonable diligence to get the property insured: that is, to have the property rated and take all other steps necessary to authorize him to write the policy, and, if unable to protect the property, then seasonably to notify the plaintiff on his inability to do so.
—Russell v. O'Connor, 70.

5. Instructions in such action *held* to constitute error prejudicial to the defendant, in that it was calculated to allow the jury to believe that the defendant company could be held liable on the theory that he had authority to write the insurance at once and he failed so to do, or that his liability depended upon whether a policy written by him at such time would have bound his principal, the insurance company.
—Russell v. O'Connor, 67.

INSURANCE (INDEMNITY).

REFORMATION OF POLICY.

6. Refusal of the trial court to grant reformation of an employer's liability insurance policy, so as to make it fully cover the amount paid by the insurance company upon a judgment against the insured in favor of an injured employee, and thus to defeat the insurance company's claim against the insured for the excess so paid over and above the face of the policy, *held* sustained by the evidence.
—Ætna Life Insurance Co. v. Flour City Ornamental Iron Works, 463.

FAILURE OF INSURED TO OBSERVE STATUTE.

7. In this action to recover from the insurer in a liability insurance contract the amount paid by the insured in the settlement of an action brought against him, made after the insurer had denied liability under the contract and refused to defend the action, it is *held* the accident was not caused by "the failure of the insured to observe any statute affecting the safety of persons," was covered by the contract, and the insurer, in denying liability and refusing to defend the action after notice, breached the contract.
—Butler Brothers v. American Fidelity Co. 157.

8. The language of the policy should be construed to refer to such statutes as directly aim to secure the safety of persons engaged in or around

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INSURANCE (INDEMNITY)—Continued.
dangerous work, as, for instance, laws requiring certain machinery to be guarded.
—Butler Brothers v. American Fidelity Co. 163.

NOTICE TO INSURER OF SECOND ACTION.

9. It was not necessary to notify the insurer of a second action brought for the same cause after the voluntary dismissal of the first action, where the insurer was notified of the first action, but denied liability, and refused to defend the same.
—Butler Brothers v. American Fidelity Co. 157.

EVIDENCE.

10. In an action to recover from the insurer in a liability insurance contract the amount paid by the insured in the settlement of an action brought against him there was no prejudicial error in the admission of certain evidence.
—Butler Brothers v. American Fidelity Co. 158.

SETTLEMENT OF CLAIM WITHOUT CONSENT OF INSURER.

11. By its denial of liability and refusal to settle or defend the action, the insurer released the insured from its agreement not to settle a claim without the consent of the insurer, and waived the condition of the contract making a judgment after trial of the issue a condition precedent to a recovery by the insured under the contract.
—Butler Brothers v. American Fidelity Co. 157.

12. Where the insurer has agreed to settle or defend an action brought to recover of the insured for an accident covered by the policy, and has wrongfully refused to so settle or defend the action, and the insured defends the same and in good faith makes a settlement thereof, he may recover the amount paid on such settlement, unless it is shown that there was in fact no liability, or that the amount paid was excessive. A settlement upon a stipulation of settlement is presumptive evidence that there was a liability and as to the amount thereof.
—Butler Brothers v. American Fidelity Co. 158, 168.

13. The trial and judgment required in a casualty policy, like the arbitration and award required in a fire policy, do not constitute the liability insured against, but merely the means by which the fact and amount of such liability are ascertained.
—Butler Brothers v. American Fidelity Co. 167.

14. The amount paid on a reasonable settlement constitutes a loss from a

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INSURANCE (INDEMNITY)—Continued.

liability imposed by law as much as does the payment of a judgment rendered after a trial.

—Butler Brothers v. American Fidelity Co. 164.

15. The record in this case considered, and *held* to show that the question of the insured's liability in the case settled was not an issue under the pleadings, that such issue was not tried by consent, and that it was not shown by the evidence that the insured was not liable for the accident, or that the amount paid in the settlement thereof was excessive.

—Butler Brothers v. American Fidelity Co. 158.

RECOVERY OF AMOUNT PAID BY INSURER'S MISTAKE.

16. The defendant's contention that the plaintiff was precluded from a recovery by its negligent failure to effect a settlement with the defendant's injured employee before suit and judgment on his claim *held* not sustained by the evidence.

—Ætna Life Insurance Co. v. Flour City Ornamental Iron Works, 463.

17. The trial court's finding as to the amount of indemnity called for by the policy, which had been destroyed by fire, *held* sustained by the evidence.

—Ætna Life Insurance Co. v. Flour City Ornamental Iron Works, 463.

INSURANCE (LIFE).

MUTUAL BENEFIT.

18. An officer of a fraternal insurance order represents such order in the performance of the duties of his office, so that his knowledge and action in reference to a matter within the scope of such duties, in the absence of fraud, may be considered as the knowledge and action of the order. Rule applied to the master workman and financier of a local lodge.

—Hendrickson v. Grand Lodge A. O. U. W. 36, 43.

SAME—SERVICE OF PROCESS ON FOREIGN ASSOCIATION.

19. Laws 1907, p. 478, c. 345, § 19 [R. L. Supp. 1909, § 1704-29], providing for the service of process upon foreign "fraternal beneficiary associations," construed, and *held* to furnish the only method for the service of a summons in a civil action upon such an association.

—Spencer v. Court of Honor, 422.

SAME—PROHIBITED OCCUPATION.

20. A by-law of the defendant, a fraternal insurance company, provided that

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INSURANCE (LIFE)—Continued.

if a member should enter into the business or occupation of selling at retail intoxicating liquors as a beverage his membership should cease, and the insurance certificate and all rights thereunder should become forfeited. Plaintiff's husband, a common laborer, while a member, accepted work in a village saloon as a temporary substitute for the bartender for five or six weeks, during which time he paid an assessment that came due on the membership certificate. This assessment was accepted and retained by the officers of the local lodge. Three days after the insured quit the said temporary employment he died. After his death, and with knowledge of his said employment, defendant's grand recorder requested further proofs, not only as to his occupation, but as to burial. Assuming that the temporary employment forfeited the insurance, it is *held* that the trial court's finding that there was a waiver of the forfeiture is sustained by the evidence.

—Hendrickson v. Grand Lodge A. O. U. W. 36.

21. Probably it is a fair construction of such by-law to say that it was intended to exclude bartenders, as well as saloon keepers, from membership in the order. But it will hardly be claimed that every member of the order who might enter upon a sale of intoxicating drinks for however short a period, or under every circumstance, is thereby ipso facto expelled. So it may be contended, with reason, that it is not clear that one who temporarily acts as a substitute for a bartender does, within the meaning of the by-law, enter into the business or occupation of selling at retail intoxicating liquors as a beverage.

—Hendrickson v. Grand Lodge A. O. U. W. 38.

SAME—FORFEITURE.

22. Courts rightly construe the language of an insurance contract of even a fraternal organization most favorably to the insured, when the writing is susceptible of two constructions, one of which results in a forfeiture, and the other in an enforcement of the policy.

—Hendrickson v. Grand Lodge A. O. U. W. 39.

23. It is settled law that forfeiture of an insurance policy or contract may be waived. And this is so, notwithstanding provisions to the contrary in the contract, as in the case here.

—Hendrickson v. Grand Lodge A. O. U. W. 40.

INTERPRETER. See NEW TRIAL, 2.

INTERSTATE COMMERCE. See CARRIER, 3–7.

INTERVENTION. See AMBASSADOR AND CONSUL, 6.

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JOINT ADVENTURE.

1. In this action, brought by plaintiff for an accounting and recovery of one-half of the proceeds alleged to have been received by defendant from the sale of a section of land owned jointly by the parties, but the title of which had been taken in the name of the defendant, the court's order denying defendant's motion for a new trial, after making findings directing judgment for plaintiff, *held* erroneous, on the ground that the evidence does not justify the decision.
—Albrecht v. Latzke, 181.

2. Plaintiff and defendant bought land in Canada and subsequently exchanged it for an equity in other land. Having brought suit to rescind the exchange contract for fraud and recover the land they parted with, they found that land had been sold to bona fide purchasers and they recovered merely a judgment for damages. *Held:* In this action for an accounting and to recover plaintiff's share of the consideration received by defendant upon the sale, that, as against defendant, plaintiff was entitled only to a proportionate share in the judgment recovered, on payment of his proportionate part of the expenses incurred in obtaining it.
—Albrecht v. Latzke, 181.

JUDGMENT. See DIVORCE, 7; DRAIN, 2; REGISTRATION OF TITLE, 4, 5.

JURISDICTION OF PERSON AND SUBJECT-MATTER.

See APPEARANCE, 1, 2.

1. If the court has jurisdiction over the person of the defendant and the subject-matter of the action, the judgment is never void for error. It is valid unless reversed or set aside on appeal or by some other appropriate proceeding in the action.
—McElrath v. McElrath, 384.

VACATING DEFAULT.

2. The trial court did not abuse its discretion in refusing to set aside a judgment on account of excusable neglect of defendant's attorneys.
—Hoff v. Northwestern Elevator Co. 224.

3. Personal service of summons. Entry of default judgment on April 12, of which entry defendant had personal notice on April 22. On May 20 he gave notice of motion to be heard June 1, to vacate the judgment. The basis of the motion was that the summons was not served until April 11, and judgment was prematurely entered. The motion was denied. On June 8 defendant obtained an order to show cause why he should not be relieved of his default and permitted to answer and defend. *Held:* The application was addressed to the discretion of the trial court and its discretion was not abused in denying the application.
—Zinn v. Huhn, 491.

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JUDGMENT—Continued.

ENTRY OF JUDGMENT.

See INSURANCE (INDEMNITY) 6, 11, 13.

4. An entry at the end of findings in proceedings for the establishment of a drainage ditch: "Judgment is hereby entered in accordance with the foregoing," dated and signed by the clerk of court, is not a valid judgment in delinquent tax proceedings, without any entry in the judgment book, or a substantial compliance with statutory provisions relating to tax judgments.
—State v. Lindberg, 152.

AMENDMENT.

5. Where judgment in an action in a municipal court is entered for an amount greater than the jurisdiction of the court, the court has no jurisdiction to cure the defect by allowing a deduction from the amount of the judgment so as to bring it within the jurisdictional limit.
—Juster v. Court of Honor, 325.

ACTION TO VACATE JUDGMENT FOR FRAUD.

6. In an action, brought under R. L. 1905, § 4277, to vacate a decree for fraud, the representation must be of a substantial character, and must be unequivocal. The statute was not intended to excuse a party from exercising proper diligence in preparing for trial. He must show that he himself was guilty of no negligence.
—Wann v. Northwestern Trust Co. 493.

JUDICIAL NOTICE. See EVIDENCE, 1, 2, 3.

JURISDICTION. See APPEAL AND ERROR, 2, 6; APPEARANCE, 2; CONSTITUTION, 2; COURTS (MUNICIPAL) 1-3; JUDGMENT, 1, 5; REGISTRATION OF TITLE, 5, 6; SCHOOL AND SCHOOL DISTRICT, 2.

LANDLORD AND TENANT.

1. Action for rent of certain storerooms, wherein the defendant claimed to have surrendered the premises as untenantable prior to the termination of the term of the lease. Evidence that a tenant removed his stock of goods from a store building, but refused to give up possession or surrender the keys thereof until the expiration of his lease, *held* not so clearly against the findings as to warrant a reversal.
—Bridgeman v. Giese, 254.

2. Action for rent. *Held:* The court's finding against the defendant's coun-

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LANDLORD AND TENANT—Continued.

terclaim for damage to his goods caused by water leakage from other parts of the building, was sustained by the evidence.

—Bridgeman v. Giese, 254.

3. It does not follow from the mere fact that water leaked through a ceiling in a large building occupied by other tenants, that the landlord was negligent.

—Bridgeman v. Giese, 259.

LIEN. See CARRIER, 8; LOGS AND LOGGING; MECHANIC'S LIEN; TAXATION, 4, 6–9; TENANT IN COMMON; VENDOR AND PURCHASER, 8.

LIMITATION OF ACTION. See MUNICIPAL CORPORATION, 10.

COMPUTATION OF TIME.

1. Assuming, without deciding, that where the original complaint states one cause of action, and an amended complaint, which takes the place of the original, states another and different cause, the action must be treated as begun at the time of the service of the amended complaint, the rule is not applicable to this case, for the original and amended complaints relate to one and the same cause of action in substance. So construed, the action stated in the amended complaint must be treated as instituted at the time of the service of the summons, and a demurrer thereto upon the ground that the statute of limitations had run before the service of the amended complaint was rightly overruled.

—Gilbert v. Gilbert, 45.

ACTION AGAINST MUNICIPALITY FOR PERSONAL INJURY TO SERVANT.

2. In an action brought against a municipality to recover damages for personal injury received by a person while in its employ as a servant, by reason of its negligent failure to discharge the duties of a master, the limitation of two years prescribed by R. L. 1905, § 4078, subd. 1, does not apply.

—Quackenbush v. Village of Slayton, 373.

PART PAYMENT.

3. Evidence *held* sufficient to justify a finding that a sum of money in the hands of plaintiff as the proceeds of property sold for defendant was applied, with defendant's consent, as part payment of an overdue account held by plaintiff against him, and that such application tolled the statute of limitations and prevented the bar of plaintiff's cause of action for the balance due on the account.

—Wilson v. Blackwood, 227.

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LIMITATION OF ACTION—Continued.

PLEADING.

4. The bar of the statute of limitations is not available on demurrer, unless it clearly and unequivocally appears from the face of the pleading attacked that the statute has run against the cause of action alleged. Under this rule it may be doubtful whether the allegation that the act upon which the action is predicated took place on or about a certain date fixes that date as the one from which the statute begins to run.
—Gilbert v. Gilbert, 45, 49.

LIMIT OF INDEBTEDNESS. See MUNICIPAL CORPORATION, 3, 4.

LOCAL ASSESSMENT. See MUNICIPAL CORPORATION, 5; PARTITION; TAXATION, 5–9.

LOCAL OR TRANSITORY ACTION. See VENUE, 1–4.

LOGS AND LOGGING. See ASSIGNMENT.

LIEN STATEMENT.

1. Action to recover for labor and services, in cutting and banking logs, rendered to a logging contractor, and to enforce a lien therefor on certain of the logs purchased by the defendant company. *Held:*
(1) It is not essential to the validity of a lien statement, required by section 3525, R. L. 1905, that it be verified by the oath of some person having personal knowledge of the facts therein stated. Krengel v. Haslam, 118 Minn. 506, 137 N. W. 11, followed.
(2) The findings of the trial court referred to in the opinion show a substantial compliance with the statute as to setting forth the dates of beginning and ending the labor.
—Small v. Smith, 118.

2. R. L. 1905, § 3525, is a remedial statute and must be liberally construed. So construed, it is clear that it was not the intention of the statute to provide that the verification must be made by some person having special knowledge of the facts.
—Small v. Smith, 121.

ACTION TO ENFORCE LIEN.

3. An assignee of a log lien under R. L. 1905, § 3524, which had been properly perfected by filing the lien statement required by section 3525 before the execution of the assignment, *held* entitled to maintain an action to enforce the same, notwithstanding that the assignment was not filed for record as provided by section 3525; there being, under the

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LOGS AND LOGGING—Continued.

evidence, no question of the rights of bona fide purchasers. See section 3548.

—Horgan v. Duluth Log Co. 244.

4. Finding, in an action to enforce a log lien, that the work was done between October 1 and March 31 of the following year, thus allowing, under R. L. 1905, § 3526, until the last day of April next thereafter for the filing of the lien statement, *held* sustained by the evidence.

—Horgan v. Duluth Log Co. 244.

LOOSE LEAF LEDGER. See EVIDENCE, 10.

MALICIOUS PROSECUTION.

1. The evidence examined, and *held*, that defendants were not entitled to a directed verdict, on the ground that it fails to show that they were the cause of plaintiff's arrest and imprisonment, nor on the ground of failure to show that the prosecution was malicious and without probable cause.

—Peake v. Milaca State Bank, 455.

2. The evidence conclusively shows that the prosecution was abandoned and terminated before this action was begun.

—Peake v. Milaca State Bank, 455.

3. The court was warranted in submitting to the jury whether or not defendants had fully and fairly stated all the facts to counsel and followed his advice in the bringing of the criminal prosecution, so as to constitute a good defense herein.

—Peake v. Milaca State Bank, 455.

MANDAMUS.

1. Where the state auditor awarded to an association which was not entitled thereto the aid and recognition provided for by Laws 1911, p. 389, c. 280, and p. 530, c. 381, relating to the encouragement of county and district agricultural societies, mandamus was the proper remedy to compel him to make the award to the society legally so entitled.

—State ex rel. v. Iverson, 247.

2. Finding of the trial court in favor of the relator in such proceeding sustained.

—State ex rel. v. Iverson, 247.

MASTER AND SERVANT.

LIABILITY OF MASTER FOR INJURY TO SERVANT.

See LIMITATION OF ACTION, 2; MUNICIPAL CORPORATION, 10.

1. Contract with subcontractor for the erection of a building pro-

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MASTER AND SERVANT—Continued.

vided that the subcontractor should prosecute his work at such time and in such order as the general contractor directed. The subcontractor erected the outside veneer of stone. The contractor erected the brick backing and anchored the stone veneer to it with anchors provided by the subcontractor. His superintendent was always at the work and there was some evidence that he exercised authority over the stone cutters. The stone cornice consisted of 5 courses of stone, each course projecting forward more than the course just below it. After 3 or 4 courses of stone had been set, the fourth course not having been backed with brick, the whole cornice, with part of the brick backing, fell and killed plaintiff's intestate, a laborer for the subcontractor. *Held:* Under the provision in the contract and because the wall and cornice were the joint product of the contractor and subcontractor, it was the duty of both to see that they were so erected as not to endanger the life of a person on the street below, and defendant contractor was not entitled to a directed verdict.

—Pelowski v. J. R. Watkins Medical Co. 114.

2. If the negligence of the general contractor concurred with that of the subcontractor and his servants as the proximate cause of the death of another servant of the subcontractor, their negligence would not absolve the general contractor from liability.

—Pelowski v. J. R. Watkins Medical Co. 114, 115.

LIABILITY OF RAILROAD COMPANY FOR INJURY TO SERVANT.

3. Whether plaintiff, at the time of the accident, was engaged in work exposing him to a hazard incident to the operation of a railroad, was, on the evidence in this case, a question of fact for the jury, and the verdict is not so against the weight of evidence that it was an abuse of discretion to refuse to set it aside.

—Pylaczinski v. Great Northern Railway Co. 74.

4. Janssen v. Great Northern Ry. Co. 109 Minn. 285, 123 N. W. 664, holding the order by the foreman in charge for expeditious work, and the fact that the order is complied with, create a hazard incident to the operation of railroads, and not the necessity in fact for such haste, followed and applied.

—Pylaczinski v. Great Northern Railway Co. 74.

5. The complaint in this case contains allegations that defendant negligently operated its trains at an excessive rate of speed and negligently failed to give proper warnings and signals, and that by reason of such negligent operation the train struck a horse upon a track and threw it against plaintiff while plaintiff was engaged in his usual

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MASTER AND SERVANT—Continued.

work of cutting grass upon the right of way. *Held* to state a cause of action.

—Kommerstad v. Great Northern Railway Co. 376.

6. *Held*, that these occurrences were not so improbable as to warrant the court in holding as a matter of law that the wrongful act was not the proximate cause of the injury.

—Kommerstad v. Great Northern Railway Co. 376.

7. A complaint which alleged in substance that defendant negligently furnished deceased with a defective monkey wrench to use in adjusting an air pump on a locomotive, that defendant had been notified of the defect, that by reason of such defect the wrench slipped while decedent was using it, he was thrown to the ground and sustained injury from which he died, is a sufficient pleading of actionable negligence.

—Crotty v. Great Northern Railway Co. 535.

MACHINERY FOR WORK.

8. *Held*, that there is no evidence in the record from which an inference could fairly be drawn that an alleged defect in the traveling crane, which carried the stone when it fell, in any manner contributed to the accident to plaintiff.

—Stage v. C. H. Young Co. 205.

SAFE PLACE FOR WORK.

9. Where the master orders his servant into a particular place to do and perform certain work, which place will be rendered dangerous and unsafe to the servant if the machinery connected therewith be without notice or warning set in motion, the master owes the servant so situated the duty of exercising reasonable care in protecting him from harm while so engaged.

—Kempfert v. Gas Traction Co. 90.

PERSON CHARGED WITH ABSOLUTE DUTIES OF MASTER.

10. A servant whose duty consists in giving signals is not thereby charged with the performance of the master's absolute duties, where the signals are a necessary part of the work in which all are engaged. Otherwise, where the employment is necessarily dangerous to the workmen or likely to expose them to injury, unless timely warned of impending danger, or the employee is at work in a place safe in itself, but by virtue of some independent work done for the master's purposes becomes dangerous, unless prior warning of the impending danger be given.

—Burke v. Ash, 392.

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MASTER AND SERVANT—Continued.

11. The act of a foreman having charge of the work, and who orders the servant into the place, in starting the machinery in motion without notice or warning, thus endangering the safety of the servant, is the act of the master, for which, if a negligent act, he is liable.
—Kempfert v. Gas Traction Co. 90.

NEGLIGENCE OF FELLOW SERVANT.

See RAILWAY, 1.

12. A negligent act of a servant while engaged in the ordinary work of his employment, which he knows or has reason to believe may expose a fellow servant to injury, is not necessarily an act of negligence for which the master is liable.
—Burke v. Ash, 388.

13. To render the master responsible for such an act it should appear: (1) That it was committed by the servant in the discharge of the duties assigned him by the master; and (2) by reason of the nature of the duties so assigned, and the nature and character of the employment, that it involved in some measure the absolute duties of the master respecting the safety of the other servants, for the discharge of which the master could not relieve himself by delegating the performance to the servant.
—Burke v. Ash, 389.

14. Evidence in an action based upon the claim that a fellow servant of the plaintiff negligently pushed him off a crowded hand car, thus causing the injuries complained of, considered, and *held* sufficient to sustain a verdict for the plaintiff, after its approval by the trial court.
—Vaneff v. Great Northern Railway Co. 18.

15. Evidence examined, and *held* to show that the cutting of grab hook holes in blocks of stone sawed and dressed in defendant's stone-dressing factory was a necessary detail of the work carried on therein, and that the cutting of such hole by a servant of defendant in a defective part of a stone, so that when lifted it broke, and in falling injured plaintiff, also a servant of defendant, was the negligence of a fellow servant, for which the defendant is not liable.
—Stage v. C. H. Young Co. 205.

SAME—LAW OF WASHINGTON.

16. Plaintiff, a brakeman on a train consisting of an engine and dump cars used by defendants in construction work in the state of Washington, was injured by the derailment of the train. One of the charges of negligence was that the engineer operated the train at an excessive rate of speed, thus causing the accident. It is *held*, under the law

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MASTER AND SERVANT—Continued.

of Washington, as proved by the decisions of the highest court of that state received in evidence at the trial, the engineer and plaintiff were not fellow servants, if the engineer was in control of the train and vested with authority to control the movements and its rate of speed.

—Walson v. McGregor, 233.

17. The evidence was sufficient to warrant submitting to the jury the question whether the engineer was so in control of the train, and to sustain a verdict that he was.

—Walson v. McGregor, 233.

ASSUMPTION OF RISK.

18. The question whether the workman assumed the risk is a matter of defense. If the assumption of risk appears affirmatively from the facts of the complaint, the question can be raised by demurrer. The complaint in this case does not show as a matter of law decedent assumed the risk from using a defective monkey wrench.

—Crotty v. Great Northern Railway Co. 535.

19. A sectionman who enters and continues in the employ of a railroad company, knowing that its road is not fenced, assumes the risks naturally incident to that condition. Fleming v. St. Paul & D. R. Co. 27 Minn. 111, 6 N. W. 448, followed.

—Kommerstad v. Great Northern Railway Co. 376.

CONTRIBUTORY NEGLIGENCE.

20. Whether plaintiff was guilty of contributory negligence, and whether he assumed the risk, were questions for the jury, and the verdict is sustained by the evidence on these points.

—Pylaczinski v. Great Northern Railway Co. 74.

21. Plaintiff was not guilty of contributory negligence as a matter of law.

—Kempfert v. Gas Traction Co. 90.

22. It was not contributory negligence, as a matter of law, for plaintiff brakeman, while engaged in the performance of his duties, to ride on the footboard of a "dinkey" engine drawing a train of dump cars. The verdict sustained the evidence that plaintiff was not guilty of contributory negligence.

—Walson v. McGregor, 237.

ACTION—PLEADING AND PROOF.

23. Where the complaint, in an action by a servant against the master for injuries alleged to have been caused by the negligence of the latter,

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MASTER AND SERVANT—Continued.

charged that the defendant furnished the plaintiff with two defective or insufficient instrumentalities with which to work, and the proof failed as to one, but the evidence as to the other was sufficient to make an issue for the jury, the fact that both of the acts of negligence so charged were alleged to have been the concurrent causes of the accident did not necessarily require a dismissal of the action, and, it appearing that the defendant was not prejudiced thereby, did not constitute ground for setting aside the verdict of the jury in favor of the plaintiff. R. L. 1905, § 4161.

—Jacobson v. Great Northern Railway Co. 53.

SAME—QUESTION FOR JURY.

24. Evidence in an action by a night coal chute tender for injuries alleged to have been caused by his employer's failure to supply his lantern with the proper kind of oil, thus causing it to be suddenly extinguished while the plaintiff was climbing a ladder attached to the chute, whereby he was caused to fall, considered, and *held* sufficient to take the case to the jury, both upon the issue of negligence and upon that of proximate cause.

—Jacobson v. Great Northern Railway Co. 53.

25. Where a foreman started machinery without warning to the servant whom he had ordered to work near it, the evidence was *held* to present an issue for the jury, and that the trial court erred in directing a verdict for defendant.

—Kempfert v. Gas Traction Co. 90.

26. Action for death of servant of subcontractor from fall of cornice in building under construction. *Held:* The general contractor, one of the defendants in the action, was not entitled to a directed verdict.

—Pelowski v. J. R. Watkins Medical Co. 108.

SAME—CHARGE TO JURY.

27. Action for personal injury to night coal chute tender. An instruction was faulty in failing to state the constituent elements of actionable negligence, but the jury elsewhere were charged that plaintiff could not recover unless defendant was negligent. *Held:* The defect was clearly due to a mere oversight on the part of the court, and not being called to the court's attention, does not constitute reversible error.

—Jacobson v. Great Northern Railway Co. 58.

SAME—VERDICT AND FINDING.

28. A cornice in a brick wall faced with cut stone, in process of erection, fell and killed a laborer of a subcontractor engaged in setting the cut stone. The general contractor was doing the brickwork, and imbedded

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MASTER AND SERVANT—Continued.

in the masonry the steel anchors which secured the stone facing to the brick part of the wall, and by contract with the subcontractor doing the stonework stipulated that the latter should do the work in a workmanlike manner and under the direction and to the satisfaction of the general contractor, and prosecute the several parts thereof at such time and in such order as the general contractor might direct. The stonesetting and bricklaying proceeded somewhat dependently, in that after each course of stone was set the brick wall was required to be built up even therewith and anchored thereto before the next stone course could be set. The general contractor's superintendent was always at the works, and observed the way in which it was done, and there is some evidence that he exercised authority over the stonesetters. *Held:* The evidence justifies the verdict that defendant's negligence was the proximate cause of the death of decedent laborer, that the general contractor, in a suit brought against him for a wrongful death of the laborer so killed, was not entitled to a directed verdict.

—Pelowski v. J. R. Watkins Medical Co. 108.

29. The special finding of the jury that the stonesetters were not negligent does not indicate perverseness, nor does it impugn the general verdict and the special finding that the defendant's negligence was the proximate cause of the death of plaintiff's intestate, so that a new trial should be had.

—Pelowski v. J. R. Watkins Medical Co. 109.

LIABILITY OF MASTER TO THIRD PERSONS.

30. The rule is well settled in this state that the master is responsible for the torts of his servant done within the scope of his agency; that is, in the course of his employment or in the line of his duty, with a view to the furtherance of the master's business, and not for a purpose personal to himself. The fact that the servant in committing the tort may have exceeded his actual authority, or even disobeyed his express instructions, does not alter the rule.

—Sina v. Carlson, 285.

31. The expression "in the course of his employment" means while engaged in the service of the master; that is, while engaged generally in the master's work. The liability does not arise when the servant steps outside of his employment to do an act for himself, not connected with his master's business.

—Sina v. Carlson, 286.

32. Where an employee is permitted, during the course of his employment,

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MASTER AND SERVANT—Continued.

to use his employer's vehicle to facilitate the performance of necessary errands of his own, the relation of master and servant exists while he is so engaged.

—Sina v. Carlson, 284, 287.

33. Where a servant, without authority from the master, permits a stranger to assist him in his work for the master, and such stranger, in the presence of the servant and with his consent, negligently does such work, the master is liable for such negligence.

—Geiss v. Twin City Taxicab Co. 368, 372.

SAME—EVIDENCE.

34. Action for personal injury to teamster hauling material for new building. Verdict in favor of plaintiff. *Held:* The evidence did not sustain the verdict, in that it fails to show the defendants guilty of any negligence.

—Strunk v. Wells Brothers Co. 77.

35. The testimony of both the owner and the driver of a team that the driver was acting without authority from the owner is not conclusive, though there is no other direct evidence on that subject. Facts and circumstances may overcome this direct testimony.

—Sina v. Carlson, 283.

36. O., a farm hand, driving a farm team, conveyed a load of his employer's furniture from his farm to his city home. Both testified that O. had no authority to do so. On returning, he collided with plaintiff's buggy. O. had full charge of this team on the farm. He had frequently driven it on the road. His testimony as to circumstances under which he came to convey his employer's goods on this occasion was denied. *Held:* A question for the jury whether he was acting within the scope of his agency.

—Sina v. Carlson, 283.

SAME—ACTION BY BAILOR.

37. Action of the court, in an action for injury to an automobile in a collision which occurred while the foreman of the defendant's repair shop was using it for his own private purposes, in submitting to the jury the question as to whether the defendant was guilty of negligence in retaining such foreman in his employment, sustained.

—Travelers Indemnity Co. v. Fawkes, 354.

38. Where the proprietor of an automobile repair shop had notice that his foreman was possessed of proclivities rendering it likely that he would injure cars left at the shop for repairs, by taking them out at im-

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MASTER AND SERVANT—Continued.

proper times and making unauthorized use of them, it was such proprietor's duty to exercise ordinary care to protect such cars from the danger of injury to which they were thus subjected.

—Travelers Indemnity Co. v. Fawkes, 353.

MECHANIC'S LIEN.

1. In a claim for a mechanic's lien, which includes different items of material furnished to the contractor at different times during the progress of the work, at an agreed price for each item, if all the materials are furnished for the same job, as the construction of a building, they may be all included in one lien; and the lien statement is filed in time, if within 90 days after the last item is furnished.

—American Bridge Co. v. Honstain, 329.

2. The finding of the trial court that all the materials furnished by respondent to the contractor in this case, including the last item, were furnished to the contractor and used in the construction of the building, to enable the contractor to comply with and fulfil the terms of his contract, is sustained by the evidence.

—American Bridge Co. v. Honstain, 329.

MEMORANDUM. See APPEAL AND ERROR, 7, 18; CARRIER, 11; EVIDENCE, 9; WITNESS, 1, 2, 3.

MISCONDUCT OF COUNSEL. See APPEAL AND ERROR, 10.

MISTAKE. See PAYMENT.

MONEY. Purchasing Power, see EVIDENCE, 2.

MORTGAGE.

DEED AS MORTGAGE.

1. The plaintiff, in an action to determine adverse claims, *held* entitled to show that a warranty deed executed by him to the defendant, and an executory contract of sale back to him, of even date therewith, constituted a mortgage.

—Mason v. Fichner, 186.

SAME—EVIDENCE.

2. In an action by the widow and heirs of a grantor against the grantee to have certain deeds declared to be mortgages, an instrument executed

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MORTGAGE—Continued.

by the defendant after the death of the grantor, whereby he agreed to sell a portion of the property involved to one of the heirs, and to accept, as a credit upon the stipulated consideration, the widow's quit-claim deed to another portion of such property, was admissible as evidence tending to show conduct on the part of the defendant inconsistent with his claim of absolute ownership.

—Holien v. Slee, 261.

3. The fact that a deed absolute in form is really a mortgage may be established by circumstantial evidence, especially where the grantor is dead.

—Holien v. Slee, 261.

4. Evidence in an action by the heirs of a grantor to have certain deeds declared to be mortgages, and for other relief, considered, and *held* sufficient to sustain the findings of the trial court in favor of the plaintiffs.

—Holien v. Slee, 261.

ESTOPPEL TO DENY VALIDITY.

5. Plaintiff conveyed land to one of the defendants by absolute deed, which was recorded, and on the same day took back an executory contract of sale from the grantee, which contained provisions for the construction of a house on the premises by such defendant, and authorized her to mortgage the property for a certain amount, which contract, however, was not recorded. *Held:* A mortgage so executed upon the premises in favor of the other defendant, which was in entire accord with the terms of the authorization contained in the contract of sale and was virtually ratified by the plaintiff, before the money secured thereby was paid over to the mortgagor, by his withdrawal of objections theretofore made to the mortgagee, was not subject to equities asserted by the plaintiff against the grantee in the deed.

—Mason v. Fichner, 185.

ASSIGNMENT OF MORTGAGE.

6. An assignment of a mortgage upon real property, though not recorded until after the death of the assignor, is valid and superior to the rights of the heirs of the assignor, who are not, within the recording act, in the position of subsequent bona fide purchasers.

—Wellendorf v. Wellendorf, 435.

7. An unacknowledged assignment of a mortgage is valid between the parties; the acknowledgment thereof being essential only to entitle it to record.

—Wellendorf v. Wellendorf, 435, 437.

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MORTGAGE—Continued.

8. Evidence *held* insufficient to justify a finding that the assignment above referred to was obtained by fraud or undue influence.

—Wellendorf v. Wellendorf, 435.

MORTGAGE TAX. See EQUITY, 1.

"MOST FAVORED NATION" CLAUSE IN TREATY. See AMBASSADOR AND CONSUL, 3, 4.

MUNICIPAL CORPORATION. See VENUE, 2.

LIABILITY FOR MONEY RECEIVED UNDER INVALID CONTRACT.

1. Where a municipal corporation receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, which contract was entered into in good faith and without purpose to violate or evade the law, but for the failure to comply with the requirements of statutes made essential to a valid contract was illegal and void, and the money or property so received is retained and subsequently devoted to legitimate municipal purposes, the municipality is liable therefor, and recovery may be had against it as upon an implied contract.

—First National Bank of Goodhue v. Village of Goodhue, 362.

2. Where a bank in good faith loans money to a municipal corporation for a legitimate corporate purpose, and the money so loaned is paid into the municipal treasury and subsequently expended for the purpose stated, recovery may be had against the municipality for a return of the money, though the contract was void because the president of the municipal council was also a managing officer of the bank, and participated in the council proceedings by which the loan was authorized.

—First National Bank of Goodhue v. Village of Goodhue, 362.

PUBLIC IMPROVEMENT—AUTHORITY TO MAKE.

3. The people of a city may so amend a home rule charter adopted by them as to authorize the expenditure of money for a local improvement, though the statutory five per cent limit of indebtedness is thereby exceeded. *Held:* In this case the people of Moorhead did amend their charter.

—A. A. White Townsite Co. v. City of Moorhead, 5.

4. An amendment to the charter of Moorhead construed, and *held* to empower and authorize the city to construct a pavement on and retaining wall along a certain street, notwithstanding that the cost of such improvement would make the indebtedness of the city exceed the limit prescribed by the original charter.

—A. A. White Townsite Co. v. City of Moorhead, 2.

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MUNICIPAL CORPORATION—Continued.

ACTION TO SET ASIDE LOCAL ASSESSMENT.

5. Where, under the charter of a city, the assessment of benefits for public improvements is given to a board of commissioners, with a right of appeal from the assessment to the district court, the owner of property assessed cannot maintain an action to set aside the contract for the improvement and the assessment against his property on any grounds not going to the want of power or jurisdiction on the part of the city to make the improvement or the assessment. His remedy by a hearing before the commissioners and by appeal is exclusive.
—A. A. White Townsite Co. v. City of Moorhead, 1.

ORDINANCE AGAINST FIRE.

6. An ordinance of the city of Minneapolis, designed to prevent the spreading of fires and to protect human life, which singles out the "two-story frame building," and enacts that it shall be unlawful for the owner thereof to furnish or lease the third or attic floor to a person or group of persons living independently of those occupying the lower floors, is *held* discriminatory, unreasonable, and void, since it does not include other buildings equally exposed to danger of fire, such as "the three-story frame building," or the brick or concrete two-story buildings, not of fireproof construction.
—State v. McCormick, 97.

TORT—CONSTRUCTION OF SEWER.

7. The standard of municipal duty in the construction of sewers and drains is ordinary care. But this rule does not permit a positive trespass on private property, or an invasion of the owner's property rights.
—Batcher v. City of Staples, 89.

SAME—ACTION FOR NUISANCE.

8. Complaint in an action to recover damages suffered by reason of the discharge of a sewer of defendant into a creek near plaintiff's land, and to enjoin the further use of such sewer, construed, and *held* to state a cause of action. The acts alleged constitute not only an invasion of plaintiff's rights of property, but a nuisance.
—Batcher v. City of Staples, 86.

SAME—EVIDENCE.

9. The finding of the trial court, fixing the damages at $100 per year, was sustained by the evidence.
—Batcher v. City of Staples, 87.

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MUNICIPAL CORPORATION—Continued.

CLAIMS FOR INJURY TO SERVANT.

10. In an action brought against a municipality to recover damages for personal injuries received by a person while in its employ as a servant, by reason of its negligent failure to discharge the duties of a master, R. L. 1905, § 768, does not apply, either as to the service of written notice or as to the limitation of one year within which the action must be brought.

—Quackenbush v. Village of Slayton, 373.

STREETS—ICE AND SNOW.

11. Though mere slipperiness from the accumulation of ice and snow upon the streets and sidewalks of a municipality does not create a liability for injuries received in consequence of that condition, there may be a liability where the municipality negligently permits an accumulation of ice and snow to such an extent and for such a time that slippery and dangerous ridges, irregularities, and depressions are formed therein from travel thereon, or other causes, thus rendering the street or walk unsafe and dangerous for public use.

—Smith v. City of Cloquet, 50, 51.

12. Evidence *held* sufficient to support a verdict of liability within the rule stated.

—Smith v. City of Cloquet, 50.

NEGLIGENCE. See CARRIER, 10; MASTER AND SERVANT, 2, 7, 12–15, 16, 23, 27, 28, 33, 34; MUNICIPAL CORPORATION, 11; RAILWAY, 3, 4, 6, 8, 9; STREET RAILWAY, 13.

WILFUL NEGLIGENCE.

See STREET RAILWAY, 6, 7.

Wilful negligence, whereby liability is incurred, irrespective of plaintiff's negligence, is not simply greater negligence than that of the injured party, nor does it necessarily include the element of malice or actual intent to injure another; but is a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury.

—Havel v. Minneapolis & St. Louis Railroad Co. 196.

NEW TRIAL. See JOINT ADVENTURE, 1.

CONDUCT OF COUNSEL.

1. The remarks of plaintiff's attorney to the jury, not going beyond legitimate argument, were no ground for a new trial.

—Geiss v. Twin City Taxicab Co. 373.

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NEW TRIAL—Continued.

DISQUALIFICATION OF INTERPRETER.

2. It was not error to deny a new trial because of affidavits tending to show that an interpreter who acted on the trial was interested in the case.

—Pylaczinski v. Great Northern Railway Co. 75.

NEWLY DISCOVERED EVIDENCE.

3. The trial court did not err in denying a new trial on the ground of newly discovered evidence relating to collateral facts and cumulative.

—Wunder v. Turner, 17.

4. The trial court did not abuse its discretion in denying the defendant's motion for a new trial, made more than two years and seven months after the verdict was returned, on the ground of newly discovered evidence. The newly discovered evidence was a written agreement and certain telegrams.

—Humphrey v. Monida & Yellowstone Stage Co. 94, 95, 96.

5. The trial court did not abuse its discretion in granting a new trial on the ground of newly discovered evidence. The fact that a certain letter, newly discovered, was cumulative evidence, in the sense that evidence on the issue involved had been received at the trial, was not enough to show an abuse of discretion.

—Archer v. Whitten, 433, 434.

6. We approve the rule that a new trial on the ground of newly discovered evidence should not ordinarily be granted when it appears that the only reason for not producing the evidence on the trial is that its existence was forgotten. But in this case we have a showing of a pretty thorough search for all papers relating to the controversy, and a reasonable excuse for failing to discover the letter.

—Archer v. Whitten, 434.

NOTICE. See INSURANCE (INDEMNITY) 9; REGISTRATION OF TITLE, 1, 3, 4; TRIAL, 1, 2.

NUISANCE. See MUNICIPAL CORPORATION, 8.

OFFICIAL BOND. See PRINCIPAL AND SURETY.

ORDINANCE. See MUNICIPAL CORPORATION, 6.

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PARTIES TO ACTION. See REGISTRATION OF TITLE 2, 4; SPECIFIC PERFORMANCE, 1.

1. An objection to the introduction of any evidence, on the ground that there is a defect of parties, in that plaintiff is only a part owner of the cause of action, was properly overruled, since such an objection must be taken by demurrer or answer, and in either case the pleading must point out the person claimed to be a necessary party.

   —Holden & Wheeling Mutual Fire Insurance Co. v. Chicago Great Western Railroad Co. 230.

2. Defect of parties in a complaint, not having been objected to by demurrer or answer, was waived.

   —Randall Printing Co. v. Sanitas Mineral Water Co. 268, 272.

PARTITION.

An action in partition may be maintained against the city of St. Paul to determine rights in property the title to which was acquired under proceedings to foreclose general tax and local assessment liens.

—Gould v. City of St. Paul, 172.

PART PERFORMANCE. See FRAUDS (STATUTE OF) 2.

PAYMENT. See LIMITATION OF ACTION, 3.

The plaintiff insurance company, having paid the full amount of the judgment against the defendant, the insured, in favor of the latter's injured employee, in the mistaken belief that such amount was fully covered by the policy, was entitled to recover from the defendant the excess so paid over and above the amount of indemnity called for by the policy.

—Ætna Life Insurance Co. v. Flour City Ornamental Iron Works, 463.

PERPETUITY.

1. A conveyance of land in trust "to convert the same into personalty at the earliest practical moment when such conversion can be made without a sacrifice of the value" thereof, the rents, and, after such sale, the income from the proceeds, to be held in trust for a lawful purpose in perpetuity, *held* valid.

   —Young Men's Christian Association of Minneapolis v. Horn, 404.

2. Under R. L. 1905, § 3249, subd. 5, a perpetual trust in personalty may be created for the purposes therein designated, subject to the control of the district court as thereby specified. But this subdivision does not authorize accumulations.

   —Young Men's Christian Association of Minneapolis v. Horn, 404.

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PHYSICIAN AND SURGEON.

The action of the State Board of Medical Examiners in refusing to grant a license to a physician from another state, applied for under Laws 1905, p. 370, c. 236 [R. L. Supp. 1909, §§ 2297-1, 2297-2], is not appealable. The right of appeal is purely statutory.

—Williams v. Minnesota State Board of Medical Examiners, 313, 318.

PLEADING.

1. Rules of pleading and practice are mere means to an end, and do not themselves constitute the end sought to be obtained by a judicial determination, their purpose in all cases being to facilitate and insure the administration of justice; and in no case should they, by blind and unreasoning application, be allowed to defeat the very purpose for which they were adopted. Where the reason of such rule fails, the rule ceases to apply.

—Jacobson v. Great Northern Railway Co. 52, 56.

2. A pleading will be held sufficient when the necessary allegations may be gathered from all the averments, although it is deficient in logical order and technical language. And as against a demurrer it will be construed to state all facts that can reasonably be implied from the allegations made. Facts so implied are traversable in the same manner as though directly stated.

—First National Bank of Hastings v. Corporation Securities Co. 107.

COMPLAINT.

See APPEAL AND ERROR, 5; CORPORATION, 5, 10; FRAUD, 2; LIMITATION OF ACTION, 1; MASTER AND SERVANT, 5, 7, 23; PARTIES TO ACTION, 2; TROVER AND CONVERSION, 1; VENUE, 3.

3. Within the rule that when a complaint, after entry of judgment, is attacked for failure to state a cause of action, every reasonable inference must be indulged in to sustain the pleading, the complaint involved in this action is *held* to have stated a good cause of action for divorce on the ground of wilful desertion.

—McElrath v. McElrath, 380.

4. When a complaint is challenged by a demurrer, the court will not ordinarily go beyond an inquiry whether, on any view of the facts pleaded, a cause of action is stated. It will not attempt to pass upon the question whether recovery may or may not be had upon all the different theories to which the facts pleaded may be susceptible. The court limits its inquiry to the question whether, upon any particular theory, a cause of action is stated.

—First National Bank of Hastings v. Corporation Securities Co. 107, 108.

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PLEADING—Continued.

ANSWER.

See BREACH OF PROMISE, 1; PARTIES TO ACTION, 1.

5. Where the answer sets up in abatement defect of parties, it must name the party omitted.
—Holden & Wheeling Mutual Fire Insurance Co. v. Chicago Great Western Railroad Co. 232.

DEMURRER.

See PARTIES TO ACTION, 1; TRESPASS.

6. Where the facts from which assumption of risk arises appear from the face of the complaint, that question may be raised by demurrer.
—Kommerstad v. Great Northern Railway Co. 376.
—Crotty v. Great Northern Railway Co. 535.

AMENDMENT OF COMPLAINT.

See APPEAL AND ERROR, 20.

7. The trial court did not abuse its discretion in allowing plaintiff to amend his complaint.
—Wilson v. Blackwood, 230.

POSSESSION. See ADVERSE POSSESSION; LANDLORD AND TENANT, 1.

PRINCIPAL AND SURETY.

R. L. 1905, §§ 4523, 4524, prescribing the requirements of official bonds as to the number of sureties and their justification, have no application to bonds other than statutory official bonds.
—Blied v. Barnard, 399.

PRIVILEGED COMMUNICATION. See STREET RAILWAY, 5.

PROCESS. See COURTS (MUNICIPAL) 3; INSURANCE (LIFE) 19; TRIAL, 1, 2.

1. Testimony as to the value of lands owned in the county, by the one upon whom service of a summons in an action for money judgment purports to have been made, *held* admissible as indirectly bearing upon the probability of such service, in view of his situation and subsequent conduct.
—Lunschen v. Peterson, 288.

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PROCESS—Continued.

2. A verdict finding that the summons was not served in an action wherein judgment was entered by default, and upon execution issued thereon the land involved in this action was sold, *held* sustained by the evidence.
—Lunschen v. Peterson, 288.

PROXIMATE CAUSE. See MASTER AND SERVANT, 2, 6, 24, 28.

PUBLIC LAND.

SETTLEMENT ON LAND GRANTED TO RAILROAD.

1. It was immaterial that defendant's application to enter the land as a homestead did not disclose a settlement upon the land prior to the second railroad selection.
—Kinyon v. Christianson, 339.

2. Settlement on public land within the indemnity limits of a railroad grant by a homesteader before the rejection of the railroad's selection, with continued residence thereon, was the initiation of proceedings to acquire the land under the homestead laws, and was not subject to appropriation by the railroad company as indemnity land at the time of its second selection.
—Kinyon v. Christianson, 338.

3. The rejection of the first selection of the railroad company by the Secretary of the Interior was fatal to any claim that the title of plaintiffs relates back to the date of the first selection.
—Kinyon v. Christianson, 339.

4. The fact that, after a homesteader had settled upon public land within the indemnity limits of a railroad land grant and tendered a filing upon a quarter section, he again tendered a homestead application limited to three 40-acre tracts of the quarter section, is not a waiver or abandonment of his rights under the former application so far as concerns the 40-acre tract not included in the second application.
—Slocum v. Christianson, 528.

FORMER DECISIONS FOLLOWED.

5. In an action involving title to a tract of land within the indemnity limits of the land grant to the Hastings & Dakota Railway Company, the controversy being between a settler upon the land under the claim of homestead rights, and the successor in interest of the railroad com-

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PUBLIC LAND—Continued.

pany, it is *held* that the facts present a case substantially similar to Osborn v. Froyseth, 105 Minn. 16, 119 N. W. 1113, and Osborn v. Froyseth, 216 U. S. 571, 54 L. ed. 619, and the decisions there rendered are followed and applied.

—Kinyon v. Christianson, 335.

PUBLIC POLICY. See CARRIER, 1, 2; CONTRACT, 2.

PUBLIC PROPERTY. See TAXATION, 1–4.

RAILROAD HAZARD. See MASTER AND SERVANT, 3, 4.

RAILWAY. See MASTER AND SERVANT, 3–7.

1. Action for injury caused by being negligently pushed off a crowded handcar by a fellow servant. Verdict, approved by the trial court, *held* sustained by the evidence.

—Vaneff v. Great Northern Railway Co. 18.

INJURY AT HIGHWAY CROSSING.

2. It appearing that the accident occurred at night, that the view in the direction from which the train approached was somewhat obstructed by buildings, and there being evidence tending to show that the night was hazy, that the headlight of the engine was dim, that the train was running fast and made little noise, and that no signals were given for the crossing, the question of contributory negligence on the part of the deceased was for the jury, especially in view of the presumption of due care on the part of a deceased person killed by the negligence of another.

—Tegels v. Great Northern Railway Co. 32.

3. Evidence, in an action for the death of a pedestrian at a railway crossing, considered, and *held* sufficient to take the case to the jury upon the question as to whether the defendant's employees in charge of its train were guilty of negligence in failing to give the necessary and statutory signals.

—Tegels v. Great Northern Railway Co. 31.

INJURY TO PERSON WALKING ON TRACK.

4. Action for death by wrongful act. Evidence as to the defendant's alleged wilful negligence considered. *Held:* That the defendant was not entitled to a directed verdict in its favor on the issue as to its wilful negligence.

—Havel v. Minneapolis & St. Louis Railroad Co. 195.

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RAILWAY—Continued.

5. Walking on a spur track in a public street, instead of between two spur tracks on one of which cars were then standing, was not per se negligence.
—Peaslee v. Railway Transfer Co. 351.

6. In this, a personal injury action, the evidence on the issues of defendant's negligence and plaintiff's contributory negligence was such that the court was not warranted in withdrawing either from the jury or directing a verdict for defendant.
—Peaslee v. Railway Transfer Co. 347.

7. It was not error for the court, in view of defendant's contentions at the trial, to instruct the jury that, as a matter of law, plaintiff was not negligent merely by reason of deviating from the usual course in walking upon a public street which was nearly filled with railway tracks.
—Peaslee v. Railway Transfer Co. 347.

8. Even if no custom existed of having a man with a lighted lantern either walking ahead of the car as it was pushed in on a spur track, or stationed on top of the car at the front end thereof, it was for the jury to say whether pushing a railway car in the dark on a much traveled public street, without any light or person at the front to give warning of its approach, was negligence.
—Peaslee v. Railway Transfer Co. 350.

FAILURE TO FENCE TRACK.

9. Failure of a railway company to fence its track as required by statute is evidence of negligence. *Held*, however, following Fleming v. St. Paul & D. R. Co. 27 Minn. 111, 6 N. W. 448, that this liability is subject to such qualification as the general rules of law impose in analogous cases, and that if a section man enters and continues in such service, knowing that the road is not fenced, he assumes the risks naturally incident to such condition.
—Kommerstad v. Great Northern Railway Co. 376.

FIRE.

10. The evidence sustains the verdict that the fire which caused the loss was set by sparks from defendant's locomotive.
—Holden & Wheeling Mutual Fire Insurance Co. v. Chicago Great Western Railroad Co. 230.

11. Action for the destruction of plaintiff's saw mill by fire started by sparks from defendant's engine. *Held:* The evidence warranted submitting to the jury the question whether the fire was so started.
—McClure v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 523.

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RAPE. See CRIMINAL LAW, 1-6.

RECONVEYANCE OF TITLE. See DEED.

RECORDING ACT. See MORTGAGE, 6.

REFORMATION OF INSTRUMENT. See INSURANCE (INDEMNITY) 6.

REGISTRATION OF TITLE.

1. Clearly the applicant is charged with the knowledge acquired by her attorney.
—Riley v. Pearson, 222.

PARTIES DEFENDANT.

2. It is the duty of the court to determine what parties shall be named as defendants in a registration proceeding; but it is not to be expected that the court can or should do this without the aid of the applicant and the examiner.
—Riley v. Pearson, 223.

CONCLUSIVENESS OF DECREE.

3. It is the law, as declared by the act itself and the decisions, that a decree of registration, in the absence of fraud, actual or constructive, binds all the world.
—Riley v. Pearson, 217.

4. Where, in proceedings under the Torrens act to register title, the applicant fails to disclose to the court the names of persons known to him to have an interest in or lien upon the property, and such persons are not named as parties to the proceeding or served with summons, and do not have actual notice of the proceeding, a judgment rendered therein is not binding upon such persons.
—Riley v. Pearson, 210.

COLLATERAL ATTACK.

5. The rule that, where the court's want of jurisdiction appears affirmatively from the judgment roll itself, the judgment is a nullity as to those not parties to it and may be attacked collaterally, applied to a judgment in a proceeding to register title.
—Riley v. Pearson, 210.

6. Applicant in the proceedings in question herein *held* to have known before the summons was applied for that her title was subject to permanent easements owned by persons known to her, and a judgment rendered without jurisdiction of the persons owning such easements, was void as to them, and may be attacked collaterally.
—Riley v. Pearson, 210.

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RELEASE.

Although fraud cannot generally be predicated on a promise to do an act in the future, still, where the promise implies a present state of mind or existing intention of the promisor, and such is not the fact, but the promisor, in order to obtain a release, falsely induces the promisee to believe in and rely on the existence of such state of mind or present intention, such conduct may constitute legal "fraud."

—Cox v. Edwards, 512.

RES GESTÆ. See EVIDENCE, 7; STREET RAILWAY, 4.

SALE. See CARRIER, 8; FACTOR.

SCHOOL AND SCHOOL DISTRICT. See CONSTITUTION, 2.

1. The term "legal voters," as used in the proviso of Laws 1907, p. 212, c. 188 [R. L. Supp. 1909, § 1286] defining who may petition in certain cases for an enlargement of a school district, must be taken in its ordinary and usual sense, and hence does not include women.

—Oppegaard v. Board of Commissioners of Renville County, 443.

2. Where a county board, in a rearrangement of school districts, includes certain land from another district, which was not referred to in the petition under Laws 1907, p. 212, c. 188, for a change, and was not represented at the hearing before the board, the district court, on appeal from the order of the board, does not exceed its jurisdiction in modifying the order, so that the parcel erroneously included shall be returned to its proper district. It is not an usurpation of legislative power. The county board's action was a nullity.

—Oppegaard v. Board of Commissioners of Renville County, 443.

SEWER. See MUNICIPAL CORPORATION, 7, 8.

SPECIAL APPEARANCE. See APPEARANCE, 1, 2.

SPECIFIC PERFORMANCE.

PARTY TO ACTION.

1. The widow of the mortgagor, who was not a party to the oral agreement and whose interest was extinguished when the time for redemption from the foreclosure sale expired, *held* not a necessary party to this action to enforce specific performance of the agreement.

—Janochosky v. Kurr, 471, 477.

EVIDENCE.

2. Action to enforce specific performance of an alleged oral contract with reference to an invention relating to reinforced concrete construction

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SPECIFIC PERFORMANCE—Continued.

and the assignment of an interest in patents to be obtained therefor. The trial court found that in fact the contract was never made. *Held*, that the evidence sustains the court's finding of fact, and that it did not err in sustaining an objection to offered evidence of prior art patents.

—Wunder v. Turner, 13.

REDEMPTION FROM FORECLOSURE OF MORTGAGE.

3. Action to determine that defendants held certain real estate for the benefit of plaintiffs. Findings to the effect that plaintiffs, who possessed the right to redeem from a foreclosure sale, refrained from so doing in reliance on an oral agreement of the one who had procured the sheriff's certificate that he would, after the time for redemption expired, transfer to them their respective interests, upon being paid their pro rata share, *held* sustained by the evidence.

—Janochosky v. Kurr, 471.

4. The evidence does not show that the contract sought to be enforced was entered into for the corrupt purpose of unlawfully depriving a third party of property interests or rights.

—Janochosky v. Kurr, 471.

STATE AID. See AGRICULTURE; MANDAMUS, 1.

STATUTE. See INSURANCE (INDEMNITY) 7, 8.

1. In construing the provisions of the Revised Laws of 1905, the court may look to the history thereof as one of the guides to their interpretation; and, in the absence of a clear intention to change it, the law as therein written will be deemed to be the same as it was prior to the revision.

—Austro-Hungarian Consul v. Westphal, 122, 127.

2. R. L. 1905 § 3696, subd. 5, was a new enactment at the time the Revised Laws 1905 were adopted.

—Austro-Hungarian Consul v. Westphal, 134.

3. We are opposed to reading into a statute any words or meaning not therein included or clearly thereby intended. If possible the intent of the lawmakers must be gathered from the exact words used by them, especially when the same are clear and unambiguous. We may not ordinarily declare such intent to be what from other considerations it may be thought or guessed to be.

—Oppegaard v. Board of Commissioners of Renville County, 450.

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STOCK AND STOCKHOLDER. See APPEAL AND ERROR, 3; CORPORATION, 1–7, 10,

STREET RAILWAY.

RIGHTS OF PEDESTRIANS AND VEHICLES.

1. A motorman is bound to anticipate the probable presence of pedestrians or vehicles at street crossings over much frequented streets, and it was incumbent on him to so manage his car that a collision with a vehicle, should one appear on the crossing, could, if possible, be averted. It was also his duty to give the usual warnings of the approach of the car, and to limit the speed thereof to that prescribed by law as not dangerous or excessive.

—Langdon v. Minneapolis Street Railway Co. 9.

2. Street cars and pedestrians have equal rights in streets. It is as much the duty of the motorman to avoid pedestrians as it is for pedestrians to avoid the car. This duty of the motorman is emphasized when the pedestrian is a child.

—Pickell v. St. Paul City Railway Co. 340, 343.

CARE REQUIRED OF MOTORMAN.

3. When a motorman discovers a small child running toward the track on the street ahead of him, ordinary care requires that he should keep his car under very sure control.

—Pickell v. St. Paul City Railway Co. 343.

ACTION FOR INJURY—EVIDENCE—RES GESTÆ.

See EVIDENCE, 7.

4. The exclamation of the motorman to the passengers, immediately after the car stopped, was so closely related to the transaction and so spontaneous as to be admissible in evidence as part of the res gestae. It was a verbal act.

—Hedlund v. Minneapolis Street Railway Co. 322, 323.

SAME—OBJECTION TO EVIDENCE.

5. Action for personal injury. The general objection that certain documents prepared by defendant's motorman, offered in evidence by plaintiffs, were immaterial and incompetent, and not impeaching, *held* not to raise the question whether the documents were privileged communications between defendant and its employee.

—Langdon v. Minneapolis Street Railway Co. 7.

SAME—NEGLIGENCE—QUESTIONS FOR JURY.

6. There was evidence tending in a measure to support the charge of wilful negligence, and it is *held*, though the evidence in this respect left the

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STREET RAILWAY—Continued.

question in some doubt, that there was no reversible error in its submission to the jury.

—Langdon v. Minneapolis Street Railway Co. 6.

7. Action for personal injuries received in a collision between an automobile and a street car at a crossing. *Held:*

(1) There was evidence reasonably tending to show that the motorman discovered the presence of the automobile on the track and plaintiff's apparent inability to escape a collision in time to have stopped the car or slackened its speed, so as to avoid the accident. The evidence, though not making a strong showing, was sufficient to justify an instruction on wilful negligence.

(2) There was no reversible error in the instructions to the jury.

(3) The questions of defendant's negligence, contributory negligence, and wilful negligence were for the jury, and the evidence sustains the verdict.

—Hedlund v. Minneapolis Street Railway Co. 319.

8. Where the court charged that it was immaterial whether the bell or gong was sounded, if the car made sufficient noise to warn plaintiff of its approach, the court did not err in submitting to the jury the question whether the bell was rung or the gong sounded.

—Hedlund v. Minneapolis Street Railway Co. 325.

9. The motorman on appellant's car saw a child seven years and four months old near the curb, which was about 25 feet from his track. He saw her start to run as if to cross the track. There is evidence that she went on a diagonal with her back partly toward the car and that she fell on the track 20 feet ahead of the car. The fender and vestibule ran over her. It was a question for the jury whether the motorman had his car under proper control and stopped as soon as reasonable prudence required.

—Pickell v. St. Paul City Railway Co. 340.

10. Question whether a child seven years old was negligent in running in front of the car in the manner above described was one of fact for the jury.

—Pickell v. St. Paul City Railway Co. 340.

11. The motorman sounded his gong, but did not blow the whistle with which the car was equipped. *Held*, a question for the jury whether reasonable prudence required that he should have sounded the whistle.

—Pickell v. St. Paul City Railway Co. 340.

SAME—CHARGE TO JURY.

See STREET RAILWAY, 7.

12. The refusal of the court to charge that the sounding of the whistle would

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STREET RAILWAY—Continued.

have been useless if the child saw the car, *held*, under the circumstances in this case, not error.

—Pickell v. St. Paul City Railway Co. 340.

SAME—SUFFICIENCY OF EVIDENCE.

13. In an action for damages for injuries received by plaintiffs as a result of a collision between one of defendant's street cars and plaintiffs' carriage or cab, the evidence is *held* sufficient to sustain a verdict of negligence against defendant.

—Langdon v. Minneapolis Street Railway Co. 6.

SUMMONS. See APPEARANCE, 1, 2; COURTS (MUNICIPAL) 1, 3; DIVORCE, 3, 7; INSURANCE (LIFE) 19; PROCESS, 1, 2.

TAXATION. See DRAIN, 2; JUDGMENT, 4; PARTITION; TENANT IN COMMON; TRIAL, 11.

PUBLIC PROPERTY.

1. The property of the state and of its political subdivisions, arms, and agencies, such as cities within its borders, when used for exclusively public purposes, is not subject to taxation, or to proceedings for the assessment of taxes, or for their collection by judgment and sale.

—Foster v. City of Duluth, 484.

2. It is technically inaccurate to say that property belonging to a city is *exempt* from taxation, for the term "exemption" rather presupposes a liability removed by some constitutional or statutory provision. The property is exempt, not because of any such provision declaring it exempt, but because of its character as public property devoted to a public use.

—Foster v. City of Duluth, 485.

3. There is a clear distinction between private property exempted from taxation by constitutional or statutory provisions, such as institutions of public charity or corporations which pay a gross earnings tax, and public property used exclusively for public purposes which would not be subject to taxation though the Constitution had not so provided.

—Foster v. City of Duluth, 486.

SAME—ACQUISITION OF LAND SUBJECT TO TAX LIEN.

4. Where real property, acquired by the state or a city for exclusively public purposes, is, when so acquired, subject to a lien for unpaid taxes, all proceedings taken to enforce such lien, after the property is so acquired for public purposes, are void. It is the character of the property and of its owner that makes the proceedings void.

—Foster v. City of Duluth, 484, 488.

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TAXATION—Continued.

TAX SALE—PURCHASE BY CITY.

5. The city as a purchaser at a sale under assessment proceedings stands in the same position as a private person. It acquires the same rights and occupies no superior position.
—Gould v. City of St. Paul, 178.

TAX LIEN.

6. Tax liens, as well as those arising from local improvement proceedings, are purely of statutory creation. Their duration, force or effect is controlled entirely by the statutes creating them. In all respects not covered by statute, the rules and principles of the common law prevail.
—Gould v. City of St. Paul, 177.

PRIORITY OF LIEN.

7. Chapter 200, p. 255, Laws 1905, declaring local assessment liens of certain municipalities, where proceedings for the enforcement of the same are conducted independently of the delinquent tax proceedings of the state, of equal rank with the state tax lien, construed, and *held* to apply to assessment and general tax liens accruing the same year.
—Gould v. City of St. Paul, 172.

8. General state tax or local assessment liens levied in a particular year are paramount and superior to similar liens of prior years.
—Gould v. City of St. Paul, 172.

TAX TITLE.

9. In the absence of a statute to the contrary, general tax and local assessment liens are merged and extinguished on the perfection of a title under the same.
—Gould v. City of St. Paul, 172.

TELEGRAPH AND TELEPHONE.

1. Whether respondent, a rural telephone company, incorporated "under and pursuant to the provisions of" R. L. 1905 c. 58, as expressed in its articles of association, but not in fact for the purpose of pecuniary profit, but solely for the mutual benefit of the members thereof, is a public service corporation, and as such under legal obligation to afford telephone facilities over its line to all applicants, quære?
—State ex rel. v. Hawk Creek Telephone Co. 395.

2. Conceding it to be such a corporation, it is *held*, on the facts stated in the

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TELEGRAPH AND TELEPHONE—Continued.
opinion, that its refusal to serve relators was neither arbitrary nor unreasonable.
—State ex rel. v. Hawk Creek Telephone Co. 395.

TELEPHONE. See TELEGRAPH AND TELEPHONE.

TENANT IN COMMON.
Where title under a state tax lien is perfected by an individual, and title under a local assessment lien is perfected by the municipality levying the assessment, both titles being so perfected in separate and independent proceedings, and the liens being under the provisions of chapter 200, p. 255, Laws 1905, of equal rank, the parties become by operation of law joint owners of the property.
—Gould v. City of St. Paul, 172.

TIME CHECK. See ASSIGNMENT.

TORRENS ACT. See REGISTRATION OF TITLE.

TORT. See MASTER AND SERVANT, 30–33; MUNICIPAL CORPORATION, 7, 8.

TREATY. See AMBASSADOR AND CONSUL, 3, 4.

TRESPASS. See MUNICIPAL CORPORATION, 7, 8.
An unlawful interference with a lawful right to abide in a home selected by plaintiff and his wife is an actionable wrong, entitling them to recover for such damages as are shown to have proximately resulted therefrom. The demurrer to the complaint was properly overruled.
—Parks v. Byrne, 519.

TRIAL.

PLACE OF TRIAL.

See VENUE, 1, 4, 5.

NOTICE OF TRIAL.

1. Service of notice of trial is complete when the notice is properly mailed. Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381, followed.
—Hoff v. Northwestern Elevator Co. 224, 226.

2. When a paper served by mail actually comes to the hands of the person to be served within the time required for personal service, the service is good, though the mailing was after the time prescribed by law.
—Hoff v. Northwestern Elevator Co. 224.

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TRIAL—Continued.

ADMISSION OF EVIDENCE.

3. The trial court did not err in its rulings upon the admission of evidence.
—Wilson v. Blackwood, 230.

4. Action of trial court in admitting parol proof of the contents of a minor document collaterally involved in the action sustained.
—Drew v. Carroll, 478.

5. Action for broker's commission for making sale of land. *Held:* The trial court did not err in refusing defendant's motion to strike out plaintiff's answer as to the contents of a letter he had written to defendant, the question not being objected to before it was put, and the granting the motion to strike out being within the discretion of the court.
—Drew v. Carroll, 478.

CHARGE TO JURY.

6. Action for death from wrongful act. *Held:* No prejudicial error resulted to defendant from the instructions given to the jury, nor from a refusal to give a requested instruction.
—Pelowski v. J. R. Watkins Medical Co. 109.

7. Although by agreement a suit in ejectment and an action to remove a cloud were merged for the purpose of trying one determinative issue, it was not error to refuse a request that the jury find specially on that issue, where the court instructed the jury to predicate the general verdict solely on the one issue tried.
—Lunschen v. Peterson, 288.

8. Appellant requested the court to charge that, if the motorman used reasonable care in stopping the car, respondent could not recover. The court modified this by charging that they could still take into consideration the failure to sound the whistle. *Held,* no error.
—Pickell v. St. Paul City Railway Co. 340.

FINDINGS OF FACT.

9. A trial court is only required to find ultimate facts. In this case it rightly refused to make findings of strictly evidentiary facts.
—Wunder v. Turner, 15.

10. The foregoing rule applies to inferences from undisputed facts, to documentary evidence, and to cases submitted on depositions, or on the report of a referee appointed to take and return the evidence.
—Wunder v. Turner, 15.

11. Upon an order to show cause why amended findings in a delinquent tax

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TRIAL—Continued.

proceeding should not be made, the power to make such findings as the record before it and the law of the case justifies is fully vested in the court.

—State v. Lindberg, 153.

TROVER AND CONVERSION.

PLEADING.

1. Action for $8,400, for conversion of chattels received by defendants in exchange for plaintiff's land, conveyed to them, to be sold for the account of plaintiff. The amended complaint set out in detail the agreement between plaintiff and defendants, and averred plaintiff was the father of defendants, old, unused to business and hard pressed for money, while defendants were active business men and plaintiff relied on them not only as sons, but on their integrity and ability as business men. It also alleged that defendant, in order to procure a conveyance to themselves, represented to plaintiff that, if he would place the title in their hands, they would be able rapidly to dispose of the land and would do so and faithfully account for the proceeds; that plaintiff relied on these representations, but defendants made them in bad faith to cheat plaintiff and prayed judgment for $8,400. *Held:* The amended complaint does not state a new cause of action.

—Gilbert v. Gilbert, 48, 49.

CHARGE TO JURY.

2. Action for conversion. The court did not err in charging the jury that defendants had the burden of proving their good faith in the ownership of a warehouse receipt, and did not err in submitting certain questions to the jury. The verdict was supported by the evidence.

—Gamble-Robinson Commission Co. v. Whitaker, 521.

TRUST.

EXPRESS TRUST.

See CHARITY; PERPETUITY, 1, 2.

1. A gift to a private individual, in trust for either personal or charitable purposes, must designate the beneficiaries at least in such a way that they are capable of being rendered certain, but a gift to a corporation, with directions as to use, may be valid, not as a trust, but as a gift upon condition, though the ultimate beneficiaries of the gift are more or less uncertain.

—Young Men's Christian Association of Minneapolis v. Horn, 415, 416.

2. Land may be given to one person in trust to sell within any time, cer-

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TRUST—Continued.

tainly up to 21 years, and to pay the proceeds to another for any lawful purpose, which might be a trust to enforce for the benefit of a third person.

—Young Men's Christian Association of Minneapolis v. Horn, 421.

EXPRESS TRUST OF PERSONAL PROPERTY.

3. The provisions of R. L. 1905, § 3249, subd. 5, concerning the powers of the district court become operative only after the creation of the trust and do not affect the validity of its creation.

—Young Men's Christian Association of Minneapolis v. Horn, 421.

TRUSTEE'S ACCOUNT.

4. The correctness of items of collection reported in the account filed is settled by the decree allowing it. Appellant offered to prove various small discrepancies in the account. No reason appeared why they could not have been presented on the hearing on the account. *Held*, no error.

—Wann v. Northwestern Trust Co. 495.

5. A decree allowing an interlocutory account of a trustee does not pass upon items of expenditure which are made after its entry, and upon a claim presented after its entry, when such matters were not in fact referred to in the account, and not in fact litigated, even though the facts out of which the claim arose occurred before entry of the decree. Representations as to such matters are not material in an action to set aside the decree.

—Wann v. Northwestern Trust Co. 494.

SAME—ACTION TO SET ASIDE FOR FRAUD.

6. A palpable clerical error in a statement cannot be made the basis of an action for fraud. So *held*, where the statement reports a collection on an account to a date four months after the date of the statement. Nor can fraud be predicated on an erroneous statement that collections have been made on a contract, where from the record the court cannot determine whether any claim in fact exists, nor where, if a claim did exist, it is still a distinct and subsisting obligation of a solvent party.

—Wann v. Northwestern Trust Co. 494.

7. A general allegation in a petition for allowance of an account of a trustee that it has collected all accounts due the estate, which proves to be incorrect as to small items, is not, as a matter of law, such fraud as will justify the vacation of the decree. The same is true of an affirmative statement of the trustee in answer to a general question. The circumstances are to be considered, and it is *held* that the finding

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TRUST—Continued.

of the trial court that there was no actionable fraud because of such statements in this case should not be set aside on appeal.

—Wann v. Northwestern Trust Co. 494.

8. Representations as to the terms of a renewal lease are not ground for vacation of the decree, where the renewal lease was not consummated until after entry of the decree.

—Wann v. Northwestern Trust Co. 495.

SAME—EVIDENCE.

9. Where a beneficiary seeks to charge a trustee with fraud, less evidence is ordinarily required to establish it than where parties are dealing at arm's length. But in this case the beneficiary was a business man familiar with the subject of the trust, the relations between beneficiary and trustee had for a long time been strained, the beneficiary had for some time been making independent investigation, had expressed entire want of confidence in the trustee, had freely criticised expenditures and failure to make collections by the trustee, had employed an attorney in the very matter of the account determined by the decree which this action sought to set aside, and had finally consented to its allowance on its being corrected as suggested by him. *Held*, the case presents the ordinary one of adversary parties, and the ordinary rules of evidence apply.

—Wann v. Northwestern Trust Co. 493.

10. There was evidence that one officer of the trustee represented to appellant that certain collections under a heating contract were not made because no heat was furnished. It appeared on the trial that heat was furnished. Another officer of the trustee testified that it was collected for in full. The court so found. *Held*, the finding is sustained by the evidence, and there was no actionable misrepresentation.

—Wann v. Northwestern Trust Co. 494.

11. The rejection of an offer of evidence, intended to prove fraudulent concealment of the purpose for which an expenditure was made by means of an evasive statement of account, will not on appeal be held reversible error, where pertinent facts that were before the trial court are not in the record on appeal, especially where the item was reported to the beneficiary more than three years before the entry of the decree, where other items of account arising out of the same contract were the subject of examination, criticism, and negotiation between the parties before the entry of the decree, and where the facts were discovered before the commencement of this action and are not alleged in the complaint.

—Wann v. Northwestern Trust Co. 494.

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TRUST—Continued.

ACTION TO ENFORCE TRUST.

12. R. L. 1905, c. 60, relating to uses and trusts, does not govern an action to compel the assignee of a sheriff's certificate under foreclosure sale to comply with his oral agreement to transfer to plaintiffs, heirs of the mortgagor, their respective interests under the certificate, upon payment by them of their proportionate share of the cost.
—Janochosky v. Kurr, 477.

VALUE. See ESTOPPEL, 2; PROCESS, 1.

VARIANCE. See APPEAL AND ERROR, 20.

VENDOR AND PURCHASER. See MORTGAGE, 1, 5.

CONSTRUCTION OF CONTRACT.

1. Where the record shows nothing more than a conveyance for a certain consideration named in the deed and nonpayment of the consideration, the inference is that there was a sale and an agreement that the price was to be paid immediately upon delivery of the deed.
—Haarala v. Mickelson, 279.

2. A contract for the purchase of land construed, and *held*, that a covenant by the vendor to sell and convey upon payment of the purchase price was implied.
—Williams v. Gilbert, 299.

3. In such a contract, the covenant by the vendee to pay the purchase price on a day named, and the covenant of the vendor to convey, are mutual and dependent covenants, and the vendor is not entitled to a reasonable time in which to perfect title in himself after the day provided in the contract for the payment of purchase price.
—Williams v. Gilbert, 299.

4. The vendee in such a contract is entitled, upon payment of the purchase price, to the deed of their vendor, and, if the latter has no title, is not obliged to accept a deed from a stranger to the contract, but may treat the contract as breached by the vendor, and rescind. Time is of the essence of such a contract.
—Williams v. Gilbert, 300.

5. A finding of the trial court that there was no oral agreement extending the time for performance of the contract *held* sustained by the evidence.
—Williams v. Gilbert, 300.

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VENDOR AND PURCHASER—Continued.

PERFORMANCE OF CONTRACT—TITLE OF VENDOR.

6. Plaintiff sold to defendant a stock of goods in exchange for land conveyed by defendant to plaintiff. The title to the land not being perfect, defendant gave to plaintiff a bond conditioned to perfect the title within 30 days, or, if he failed to do so, to furnish a "good and sufficient bond" conditioned to perfect said title within one year from January 15, 1910; "said bond to be subject to the approval" of plaintiff and "satisfactory to him." Defendant did not perfect the title within the 30 days, but within that time tendered to plaintiff a bond conditioned to perfect the title within one year, which bond plaintiff refused to accept, and brought this action to recover the stock of goods under a chattel mortgage given thereon by defendant to secure the performance of the first bond. *Held:*

(1) Under the conditions of the first bond, defendant was obliged to perfect the title to the land within 30 days, or furnish the second bond, and that he actually perfected the title after the 30 days, but within one year, and prior to the trial, would not discharge the chattel mortgage, unless the second bond was given.

(2) Time was of the essence of defendant's agreement to perfect title within 30 days.

—Blied v. Barnard, 399.

SAME—SPECIAL FINDING.

7. The evidence conclusively showed that the second bond was a good and sufficient bond, but it was a question for the jury whether plaintiff was justified in refusing to accept it. It was error to submit to the jury the question whether the bond was in fact good and sufficient, and the answer of the jury that it was not is not sustained by the evidence. The special finding that plaintiff was justified in refusing the bond, being probably based on the erroneous finding that the bond was not in fact good, the errors are prejudicial.

—Blied v. Barnard, 399.

LIEN OF VENDOR.

8. A mother conveyed certain land to her daughter. The consideration named in the deed was $2,385. The daughter paid $100 when the deed was delivered. There was no understanding how or when the balance should be paid. After leaving the bank where the delivery was made, the $100 came into the possession of the daughter with the knowledge of the mother. There was a conflict of evidence as to how the money was returned. The mother did not demand the return of the money. *Held:*

(1) The mother was not entitled to an alleged vendor's lien for the amount of $100.

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VENDOR AND PURCHASER—Continued.

(2) The evidence did not sustain the decision that plaintiff was entitled to such lien.

—Haarala v. Mickelson, 276.

BREACH BY VENDEE—MEASURE OF DAMAGES.

9. In this action to recover damages for the breach by the vendee of an alleged contract for the sale of real estate it is *held*, conceding that a valid contract was made and broken, the evidence does not sustain the finding that plaintiff was damaged in the amount found by the trial court, or in any amount.

—Wilson v. Hoy, 451.

10. The measure of damages in such a case is the difference between the contract price and the actual or market value of the land at the time of the breach, and not the difference between the contract price and the cost of the property to the vendor.

—Wilson v. Hoy, 452.

11. It is not necessary that the written contract be signed by the purchaser. It is sufficient if it is signed by the vendor, delivered to the purchaser and accepted by him.

—Wilson v. Hoy, 453.

VENUE.

LOCAL OR TRANSITORY ACTION.

1. The general rule is that actions must be brought and tried in the county where the parties reside; but if the subject-matter of the action is situated in a county other than the one in which the parties reside, and the primary purpose of the action and the principal relief sought relate to such subject-matter, then the action must be brought and tried in the county where such subject-matter is situated. It is not sufficient to bring a case within the exception to the rule that the complaint asks for relief as to the subject-matter which is merely incidental to the primary purpose of the action.

—State ex rel. v. District Court of Clay County, 99, 102.

2. Actions against municipalities are inherently local. The common-law rule has not been changed in this state.

State ex rel. v. District Court of Waseca County, 459, 460.

3. Complaint construed, and *held*, that the primary and principal relief sought to be obtained by the action was an accounting, with the cancelation of a real estate mortgage as incidental relief, and that the action is a transitory one.

—State ex rel. v. District Court of Clay County, 99.

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VENUE—Continued.

4. An action to set aside deeds executed and delivered by plaintiff to defendant, on the ground that they were procured by fraud and misrepresentation of defendant, and that by decree the title be revested in her, in which defendant sets up in his answer a counterclaim, alleging ownership of the lots conveyed, is local, and not transitory, and should be tried in the county where the land is located.
—State ex rel. v. District Court of Big Stone County, 526.

CHANGE OF VENUE.

See CORPORATION, 8, 9.

5. R. L. 1905, § 4096, providing that, if there are several defendants residing in different counties, the trial shall be had in the county upon which the majority of them unite in demanding, does not authorize a change of venue in an action to which a municipal corporation is a party defendant from the county in which such municipality is located, though a majority of the individual defendants unite in demanding a change to the county of their residence.
—State ex rel. v. District Court of Waseca County, 458.

SAME—HEARING.

6. Appearance at and argument of a motion to strike out defendant's amended answer, and admission by its attorneys of due service of a copy of the order granting the motion, and motion by defendant to strike the case from the calendar and direct the clerk of court to transmit the papers and files to the other county, after demand by defendant for change of place of trial, do not constitute a waiver of its right to have the case tried on the merits in the other county.
—State ex rel. v. District Court of Clay County, 104.

VERDICT. See APPEAL AND ERROR, 17, 25; DAMAGES, 1–6; MASTER AND SERVANT, 29.

VERIFICATION. See LOGS AND LOGGING, 1, 2.

VOTER. See SCHOOL AND SCHOOL DISTRICT, 1; WORDS AND PHRASES, 4.

WAIVER. See INSURANCE (INDEMNITY) 11; INSURANCE (LIFE) 20, 23; PARTIES TO ACTION, 2; PUBLIC LAND, 4; WORDS AND PHRASES, 7.

WILFUL NEGLIGENCE. See NEGLIGENCE; RAILWAY, 4; STREET RAILWAY, 6, 7.

WITNESS.

REFRESHING MEMORY—MEMORANDA.

See APPEAL AND ERROR, 7, 18.

1. Where the witness of one party testifies from a properly verified memoran-

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WITNESS—Continued.

dum as to facts of which he has no present recollection, the adverse party may offer such memorandum in evidence. In this case the memorandum was not returned to this court. It was offered on cross-examination solely for the purpose of showing that it was not a book of original entry, and not made by the witness, though he verified its correctness. It was in fact submitted to the court. *Held* no prejudicial error was made to appear. It is not necessary that a memorandum so used by a witness should be a book of original entry, or that it should have been made by the witness, if he can verify its correctness.

—Ammon v. Illinois Central Railroad Co. 439.

2. A memorandum may be used to quicken the memory of a witness, so that at last he testifies from his own recollection as refreshed or quickened; or it may be used where the witness has no independent recollection of the facts, even after seeing it, but recollects having seen it before, and remembers that at the time he saw it he knew its contents to be correct.

—Ammon v. Ilinois Central Railroad Co. 441.

3. Entries made by witnesses in a book kept by the plaintiff insurance company, and known as its liability policy register, *held* to constitute sufficient and proper memoranda for use by the witnesses in refreshing their recollection as to the contents of the policies, the original policies having been destroyed by fire.

—Ætna Life Insurance Co. v. Flour City Ornamental Iron Works, 463.

CROSS-EXAMINATION.

4. Where defendant in an action for a broker's commission was cross-examined, over his counsel's objection, as to what was a reasonable commission and as to the amount of commission he received in making a certain sale, and his testimony showed he made a *profit* from the purchase and sale of the land, the court did not err in overruling the objection and admitting the testimony. The trial court has a large discretion in reference to cross-examination on collateral matters, which will not be disturbed except in case of clear abuse.

—Drew v. Carroll, 481.

WOMAN. See SCHOOL AND SCHOOL DISTRICT, 1.

WORDS AND PHRASES.

1. "Creditor," within R. L. 1905, § 3696, subd. 2, includes one holding a claim for funeral expenses of the deceased.

—Austro-Hungarian Consul v. Westphal, 123.

2. It is apparent that the gravamen of "duress" is a coercion of the will

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WORDS AND PHRASES—Continued.

by physical or mental restraint, so that the victim of the duress does not act as a free moral agent in respect to the matter at stake.

—Cox v. Edwards, 517.

3. The phrase "in the course of his employment" means while engaged generally in the master's work.

—Sina v. Carlson, 286.

4. The words "legal voters," in their ordinary acceptation, do not include women.

—Oppegaard v. Board of Commissioners of Renville County, 446, 447.

5. "Neglect" in R. L. 1905, § 3696, limiting the time within which priorities of right of administration must be asserted, is used synonymously with "fail."

—Austro-Hungarian Consul v. Westphal, 123.

6. "Occupation" is defined as that to which one's time and attention are habitually devoted.

—Hendrickson v. Grand Lodge A. O. U. W. 38.

7. "Waiver" is defined as an intentional relinquishment of a known right.

—Hendrickson v. Grand Lodge A. O. U. W. 40.

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